Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, June 12, 2007 4:17 PM
To: Colborn, Paul P
Cc: Elwood, John
Subject: Re: Goldsmith Manuscript

Okay. Thx

-----Original Message-----
From: Colborn, Paul P
To: Bradbury, Steve
CC: Elwood, John
Sent: Tue Jun 12 15:34:55 2007
Subject: Goldsmith Manuscript

Steve, I suggest that your email to Jack include something like: "[redacted (b) (5)]." In particular, I think it would be helpful to [redacted (b) (5)]

Jack Goldsmith

From: Jack Goldsmith
Sent: Wednesday, June 13, 2007 7:27 AM
To: Bradbury, Steve
Cc: Colborn, Paul P
Subject: RE: Pre-publication review of book manuscript

Steve: Great idea; much preferable. Thanks, Jack

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Wed 6/13/2007 6:42 AM
To: Jack Goldsmith
Cc: Colborn, Paul P
Subject: Re: Pre-publication review of book manuscript

Jack: I will send our comments today (Wed) -- probably early afternoon. If okay with you, what I plan to do is mark passages of concern, have Dyone scan the relevant pages into a PDF, and then email it to you. That way, we can avoid use of the shared fax. Will that work for you? Thx. Steve

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Bradbury, Steve
CC: Colborn, Paul P
Sent: Wed Jun 13 03:44:21 2007
Subject: RE: Pre-publication review of book manuscript

Dear Steve,

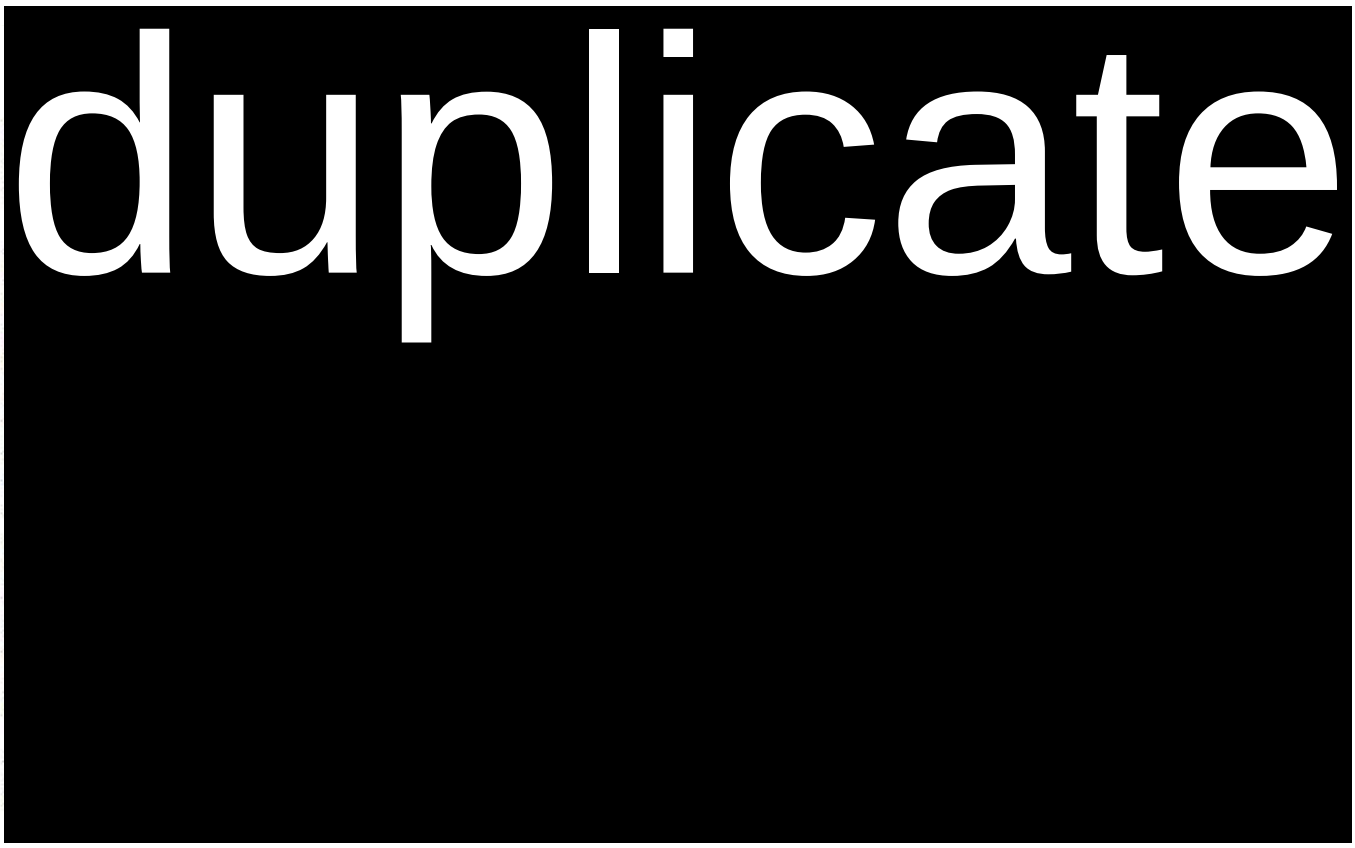
Thanks for your email, and my apologies for the delay in getting back to you.

I look forward to hearing as soon as possible from Lionel Kennedy's Office, as I recognize that I have an obligation not to disclose properly classified information. I would also be happy to consider OLC's institutional concerns. As you know, I have great fondness and respect for the Office and the Department, and I therefore welcome your comments. At the same time, I do not believe I have any obligation to adopt the Department's comments on its institutional concerns. That said, I would like to see your comments, so please fax them to 617-496-4863. This is a shared fax machine so please let me know when you send your comments so I can retrieve them myself.

Thanks Steve. I look forward to seeing you soon.

Jack

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Sat 6/9/2007 11:00 AM
To: Jack Goldsmith
Cc: Colborn, Paul P



Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, June 13, 2007 8:51 AM
To:	Bradbury, Steve
Cc:	Elwood, John
Subject:	Fw: Pre-publication review of book manuscript

I suggest your email to Jack [redacted] (b) (5) [redacted].

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Bradbury, Steve
CC: Colborn, Paul P
Sent: Wed Jun 13 03:44:21 2007

[redacted]
duplicate


duplicate

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Wednesday, June 13, 2007 3:43 PM
To:	Bradbury, Steve
Subject:	Goldsmith Manuscript
Attachments:	goldsmithmanuscript.wpd

I'm bringing you my markup of the attached draft letter to Jack, highlighting the passages you might use in your email. <<goldsmithmanuscript.wpd>>

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, June 13, 2007 8:42 PM
To: 'jgoldsmith@law.harvard.edu'
Subject: Re: OLC's pre-publication review of book manuscript

Thank you, Jack!

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Bradbury, Steve
Sent: Wed Jun 13 20:28:48 2007
Subject: RE: OLC's pre-publication review of book manuscript

Thanks Steve. I will take your suggestions and concerns very seriously. Jack

---

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Wed 6/13/2007 7:00 PM
To: Jack Goldsmith
Cc: Colborn, Paul P; Bradbury, Steve
Subject: OLC's pre-publication review of book manuscript

PRIVATE & CONFIDENTIAL

Jack:

Thank you once again for submitting your book manuscript to the Department of Justice for pre-publication review. As previously indicated, the National Security Division will respond to you directly concerning the results of its classification review. I'm following up, as promised, with respect to the review of the manuscript by the Office of Legal Counsel for privileged information.

As I indicated to you on Saturday, our review has identified a considerable number of passages in the manuscript that reveal confidential Executive Branch information. This information principally, though not entirely, consists of confidential communications between the Office of Legal Counsel and the Office of the Counsel to the President made in connection with OLC's role as legal adviser. I am sincerely concerned about the potential impact on the future relationship between OLC and the White House Counsel's Office if these client confidences are publicly disclosed. As with any attorney-client relationship, the relationship between the White House Counsel's Office and OLC depends on trust and confidentiality. If the Counsel's Office becomes concerned that OLC attorneys may publish books or articles that reveal confidential communications between the two offices, there will be an inevitable and significant weakening of that trust and expectation of confidentiality, which could well result in a chilling effect on the candid flow of information, advice, and discussion between the offices. I am sure you would agree that causing the Counsel's Office to be reluctant to seek advice from OLC, or to be inhibited in its communications with OLC, would only disserve the President, for whom the full and effective advice and assistance from legal counsel is essential to the discharge of his constitutional responsibilities. See generally Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481 (1982); Memorandum to Department of Justice Attorneys from Professional Responsibility Advisory Office, Re: Professional Responsibility Issues for Department Attorneys and Assistant United States Attorneys to Consider Upon Leaving the Department for Other Employment at 8-12 (August 2005) (discussing duty to maintain client confidences).

As we have discussed, I am separately sending to you, in three separate emails to follow, PDF copies of the relevant pages from your manuscript with the passages of concern circled and with annotations briefly identifying our concerns. (You will see that in a few places I have also included certain additional annotations suggesting other points for your consideration, some relating to the accuracy of certain statements and, in one case, suggesting that you may wish to consult with the Department of Defense as to the disclosure of the specifics of internal DoD deliberative material.) In

most cases, if not all, I really think the passages of concern could be cut, revised in relevant part, or paraphrased in a more general way, without losing the primary focus of the points made in the book.

Jack, I have great respect for your principled approach to the law, and great fondness for you personally; and I have no doubt that the disclosures you wish to make in your book are ones you believe to be important for the benefit of history and the public interest. However, I urge you to consider that these proposed disclosures have the real potential to undermine OLC's ability to function most effectively as the principal legal adviser to the Executive Branch and the President's ability to receive effective and candid legal advice. Thank you for your careful attention to these important concerns.

I hope to hear from you soon, and I'm very sorry for any delay that our review has caused in your publication process.

All the best, Steve.

Colborn, Paul P

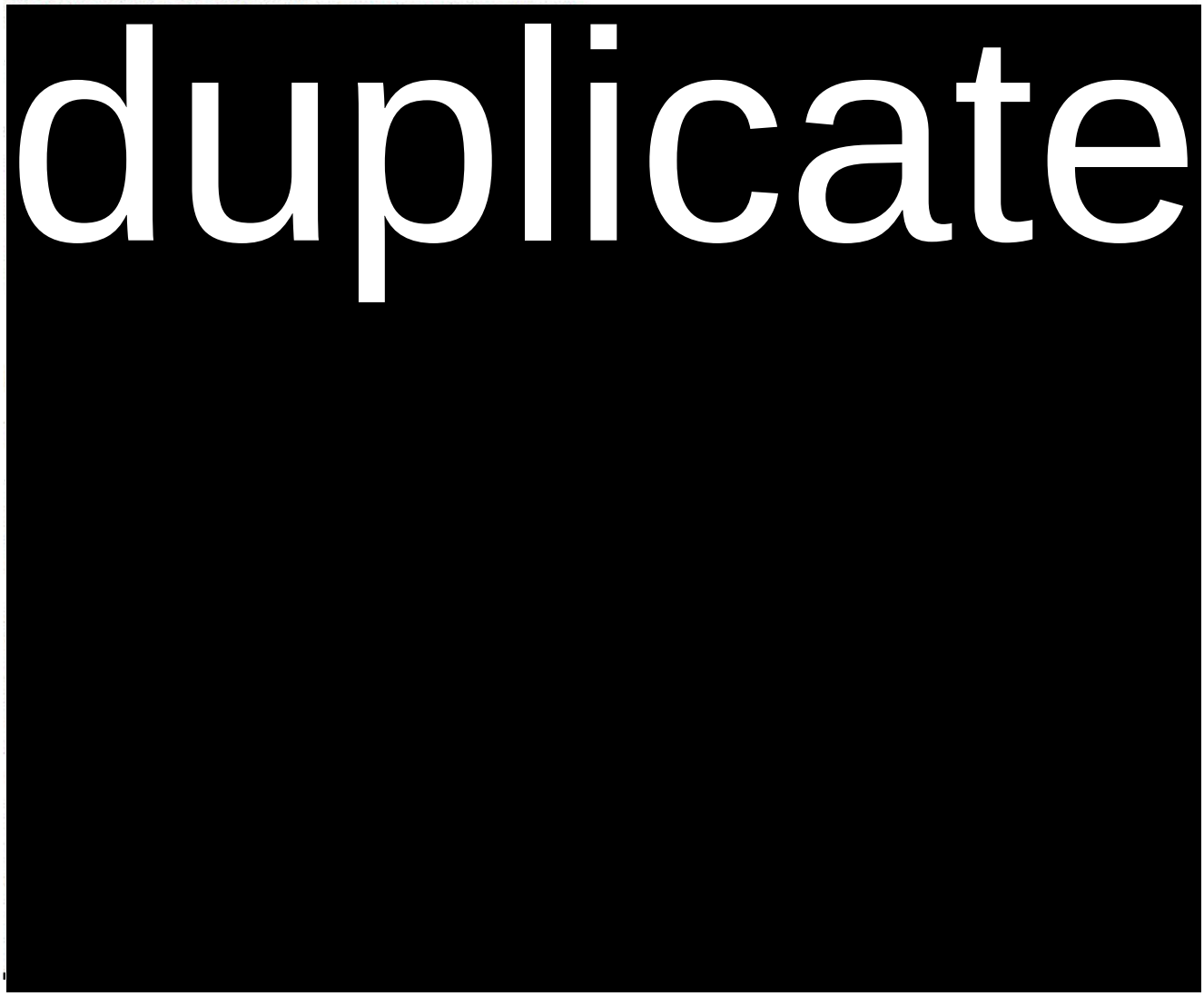
From: Colborn, Paul P
Sent: Wednesday, June 13, 2007 8:56 PM
To: Bradbury, Steve; Elwood, John; Eisenberg, John
Subject: Re: OLC's pre-publication review of book manuscript

Great news

-----Original Message-----
From: Bradbury, Steve
To: Colborn, Paul P; Elwood, John; Eisenberg, John
Sent: Wed Jun 13 20:41:32 2007
Subject: Fw: OLC's pre-publication review of book manuscript

FYI

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Bradbury, Steve
Sent: Wed Jun 13 20:28:48 2007



Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, June 14, 2007 5:04 PM
To: Elwood, John; Eisenberg, John; Colborn, Paul P
Subject: FW: PDF File 1 of 3

FYI.

From: Bradbury, Steve
Sent: Thursday, June 14, 2007 5:03 PM
To: 'Jack Goldsmith'
Subject: RE: PDF File 1 of 3

Jack: Happy to provide some further thoughts on the "chalk line" point. To me the sentence clearly suggests active or affirmative assistance by OLC in formulating tactics and operations so that they push right up to the legal limits; whereas, I think in reality and in practice, the policymakers propose what it is they want to do and we tell them whether what they propose would be lawful under the circumstances. Of course, in doing so, we interpret the governing principles (which are often, as you say, imprecise) and may suggest alternative approaches to remain consistent with those principles. But I don't think it's fair to suggest that OLC (as distinct from the policymakers) takes on the task of (or is charged with) ensuring that what is done in the national security/counterterrorism area is "right up to the chalk line of legality." Indeed, I have know of times when I (and you) have advised in this area that strict precautions should be taken to ensure that activities do not get close to the line where the principles at issue are not precise. Hope that helps. Steve

---

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Wednesday, June 13, 2007 9:33 PM
To: Bradbury, Steve
Subject: RE: PDF File 1 of 3

Steve, on the "chalk line" sentence, p. 4 ch. 3, you say this is not an accurate statement of how I approached the job. Can you tell me why, because that is how I think I approached the job, and I also think it is how OLC over many administrations generally operates in the national security/terrorism area. Perhaps you are reading the sentence to have a negative connotation in a way that I do not intend. In any event, I understand if you don't want to comment, but I hope you can. Thanks ,jack

---

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Wed 6/13/2007 7:00 PM
To: Jack Goldsmith
Cc: Colborn, Paul P; Bradbury, Steve
Subject: PDF File 1 of 3

PRIVATE & CONFIDENTIAL

<<PDF1.pdf>>

Bradbury, Steve

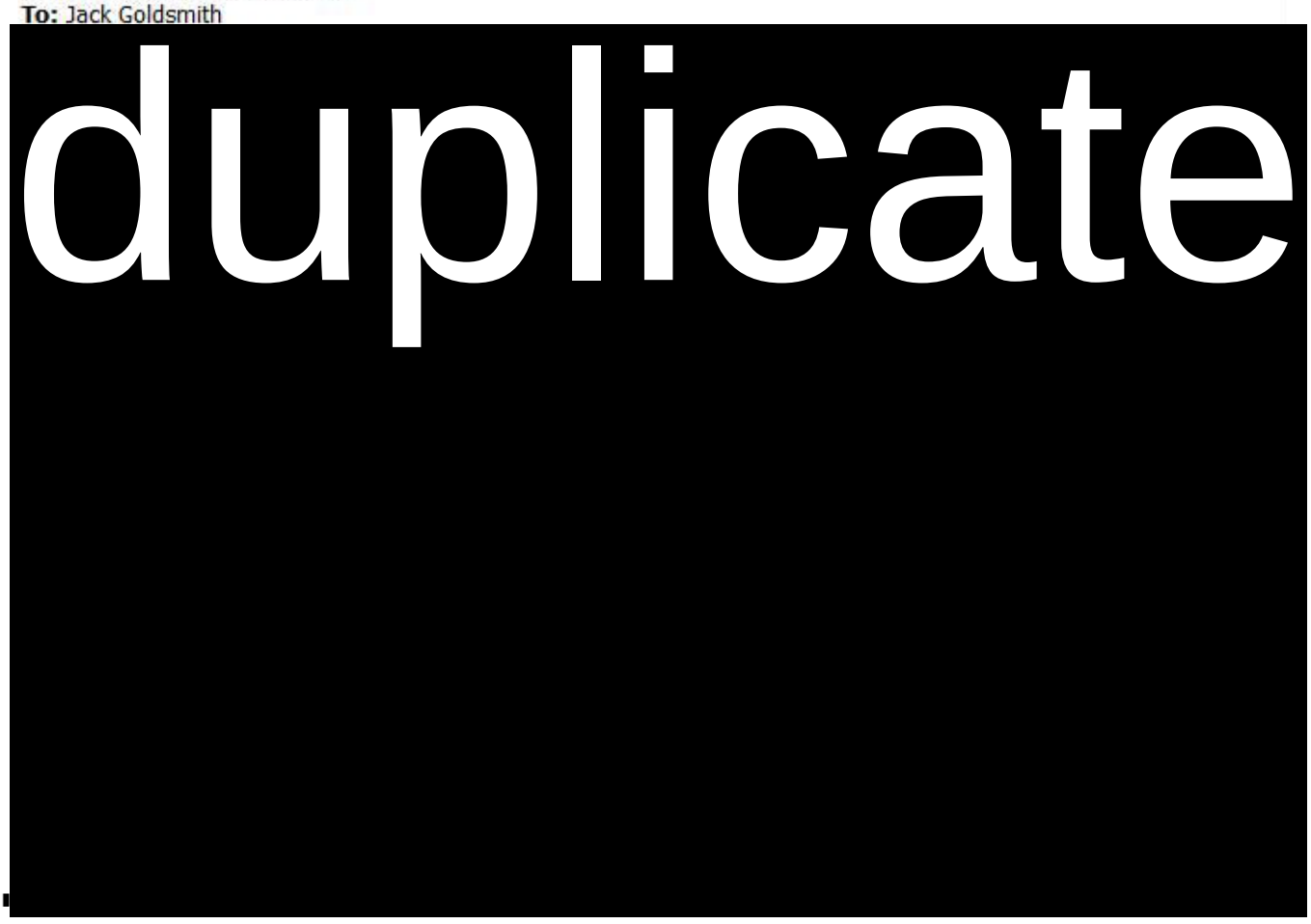
From: Bradbury, Steve
Sent: Thursday, June 14, 2007 8:05 PM
To: Elwood, John; Eisenberg, John; Colborn, Paul P
Subject: FW: PDF File 1 of 3

FYI

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Thursday, June 14, 2007 5:29 PM
To: Bradbury, Steve
Subject: RE: PDF File 1 of 3

I don't think I am saying anything different in the book. I wasn't suggesting OLC participation in tactics etc. (but I do think, and I so said, that OLC should help the White House client achieve its ends, consistent with the law), and of course if the law is unclear we so advise the client. But many many times the client wanted to know where the line was and to go right up to it. This was quite proper, especially when national security is at stake, and should not be controversial. Thanks for the comments. J

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Thu 6/14/2007 5:03 PM
To: Jack Goldsmith



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Bradbury, Steve

From: Bradbury, Steve
Sent: Saturday, June 23, 2007 6:37 PM
To: Eisenberg, John
Subject: Re: Book

I sent OLC's detailed comments re privilege issues to Jack two weeks ago.

-----Original Message-----
From: Eisenberg, John
To: Bradbury, Steve
Sent: Sat Jun 23 18:32:17 2007
Subject: Fw: Book

-----Original Message-----
From: Kennedy, Lionel
To: Eisenberg, John; Charlie Steele; Sessoms, GayLa; Colborn, Paul P
Sent: Sat Jun 23 18:31:08 2007
Subject: Fw: Book

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Kennedy, Lionel
Sent: Sat Jun 23 06:37:43 2007
Subject: RE: Book

Dear Lionel:

By my calculation, Tuesday is the end of the 30 day period by which the Department is obligated to complete its review. I know these things take time, but I am under considerable pressure from my publisher to send him the manuscript. I am therefore hopeful that you can promptly advise me of

your views as to any material in the manuscript that you believe to be classified. I am also sure you understand that, at some point, it will be necessary for me to send the manuscript to the publisher and am prepared to do on the assumption that the thirty day period having passed without comment from you means that the Department has no objection to its publication.

Jack

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Tue 6/12/2007 8:12 AM
To: Jack Goldsmith
Cc: Sessoms, GayLa
Subject: RE: Book

Jack-- GayLa Sessoms is coordinating the NSD review. I don't think we will be getting back to you this week. I will check with her. thx, Lionel

---

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Monday, June 11, 2007 11:38 PM
To: Kennedy, Lionel
Subject: RE: Book

Hi Lionel. Steve Bradbury told me that you would be getting back with me this week re preclearance review. True? Any notion when? Thanks, Jack

---

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Tue 5/15/2007 1:24 PM
To: Jack Goldsmith
Subject: RE: Book

That's fine. I hope we will make some copies of the hard copy and work off of them.

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Tuesday, May 15, 2007 1:16 PM
To: Kennedy, Lionel
Subject: RE: Book

The digital version of the document will be pdf.

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Tuesday, May 15, 2007 10:52 AM
To: Jack Goldsmith
Subject: RE: Book

Thanks, the FISA Court hasn't moved yet. The place to come is 6150 Main Justice--you may or may not remember that you can only reach our front entrance from the 9th and Constitution Ave elevator bank (#8). Are you ok getting into the building or should I let the visitor center know you are coming?

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Tuesday, May 15, 2007 10:46 AM
To: Kennedy, Lionel
Subject: RE: Book

130 is fine. Where? I will be near the DC fed court house if that is easier (has the FISa court moved yet?).

ennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov] Sent: Tue 5/15/2007 10:22 AM To: Jack Goldsmith Subject: RE: Book

Jack-- the FISA Court meeting is tomorrow, which makes my schedule a little iffy. I could meet you

for sure at 100 or 130. If those times don't work, just give me a time later in the afternoon and either I will meet you or I will have a designee lined up. thx, Lionel

---

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Tuesday, May 15, 2007 8:49 AM
To: Kennedy, Lionel
Subject: RE: Book

Lionel: Is there a time tomorrow afternoon when I can hand this to you personally? If not, is there a time when I can personally give it to a designee? Thanks, Jack

---

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Mon 5/14/2007 5:57 PM
To: Jack Goldsmith
Subject: RE: Book

Jack: can you bring it in hard copy (unless it's too voluminous) and diskette? Bring it to 6150 Main and put my name on it. Thx, Lionel

-----Original Message-----
From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Monday, May 14, 2007 4:18 PM
To: Kennedy, Lionel
Subject: RE: Book

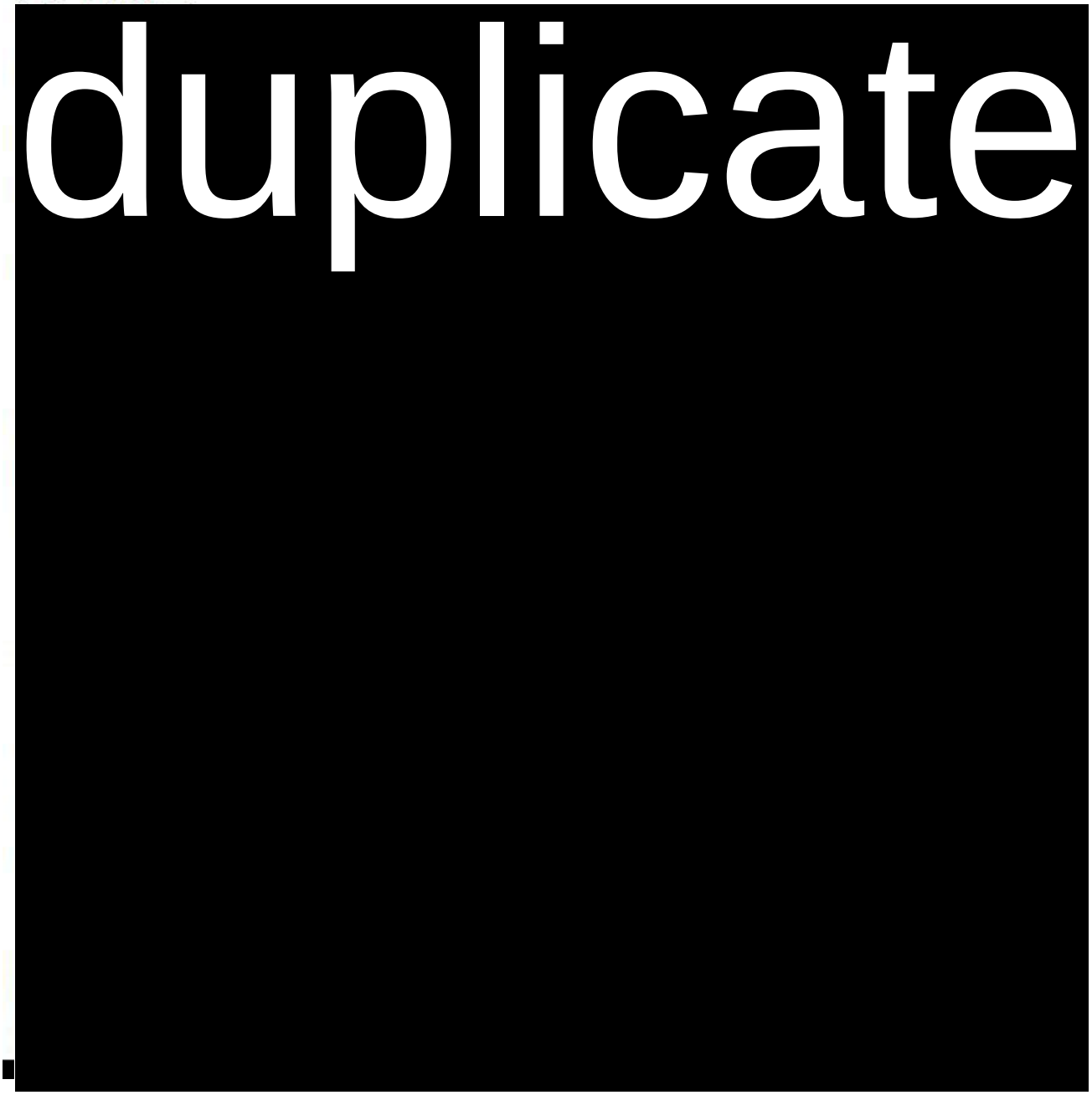
Lionel: I will be in town on Wednesday and could drop the book off then, in whatever form you liked. Thanks, Jack

-----Original Message-----
From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Saturday, May 12, 2007 9:07 AM
To: Jack Goldsmith
Cc: Colborn, Paul P
Subject: Re: Book

Jack- thanks. Am checking on where you should send it and get back to you. Lionel

---
Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Kennedy, Lionel; Jack Goldsmith <jgoldsmith@law.harvard.edu>
CC: Colborn, Paul P
Sent: Fri May 11 14:27:35 2007

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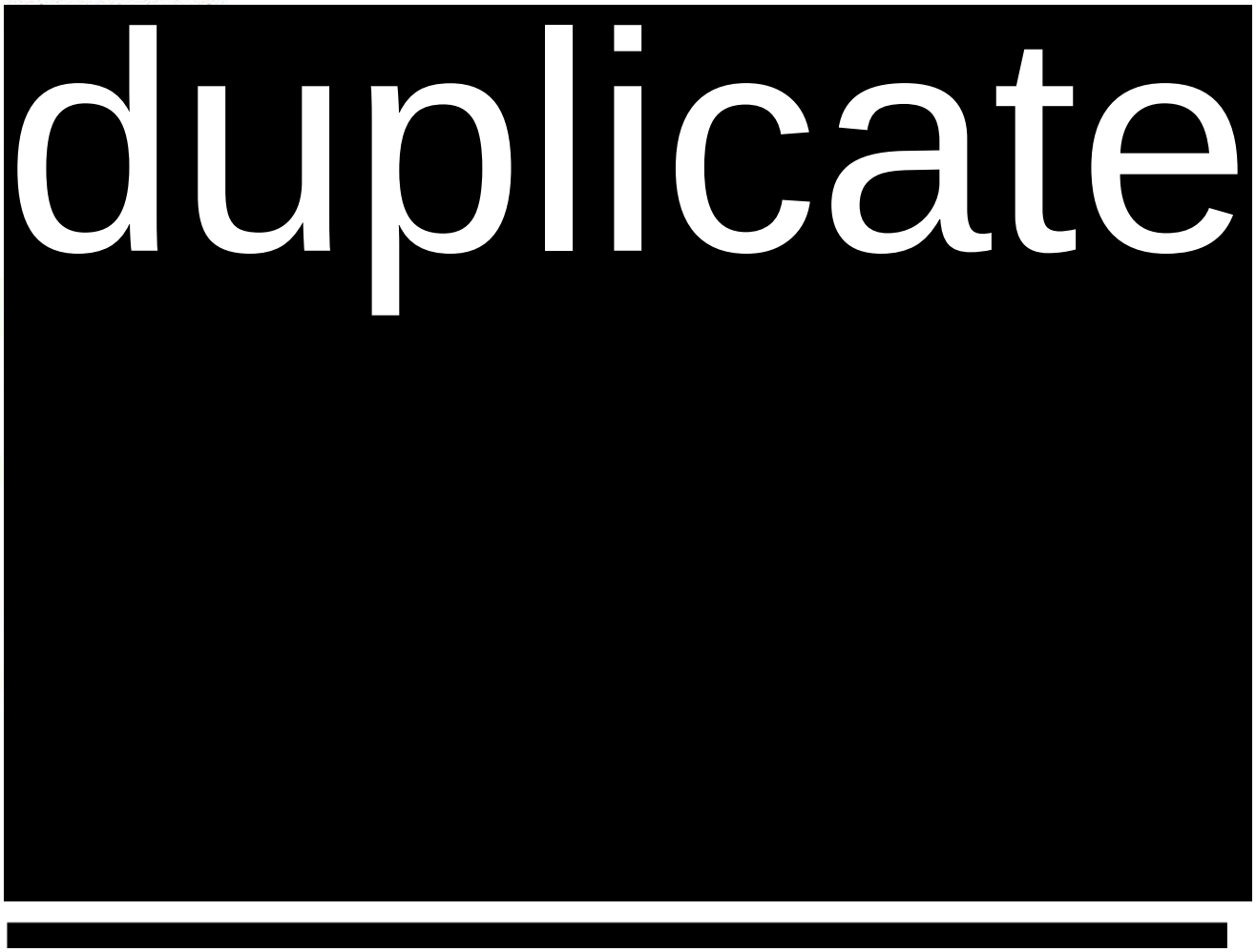
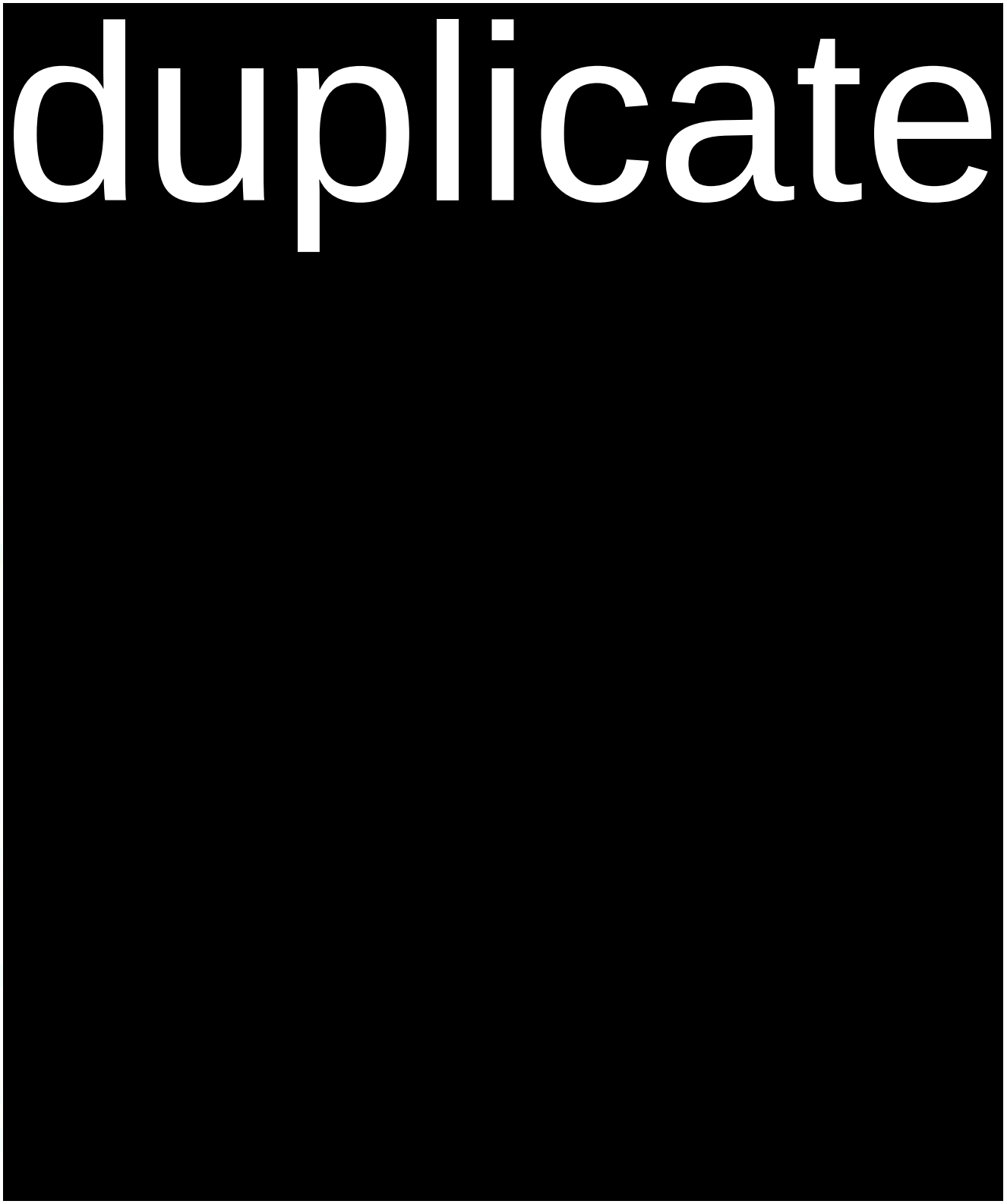
Colborn, Paul P

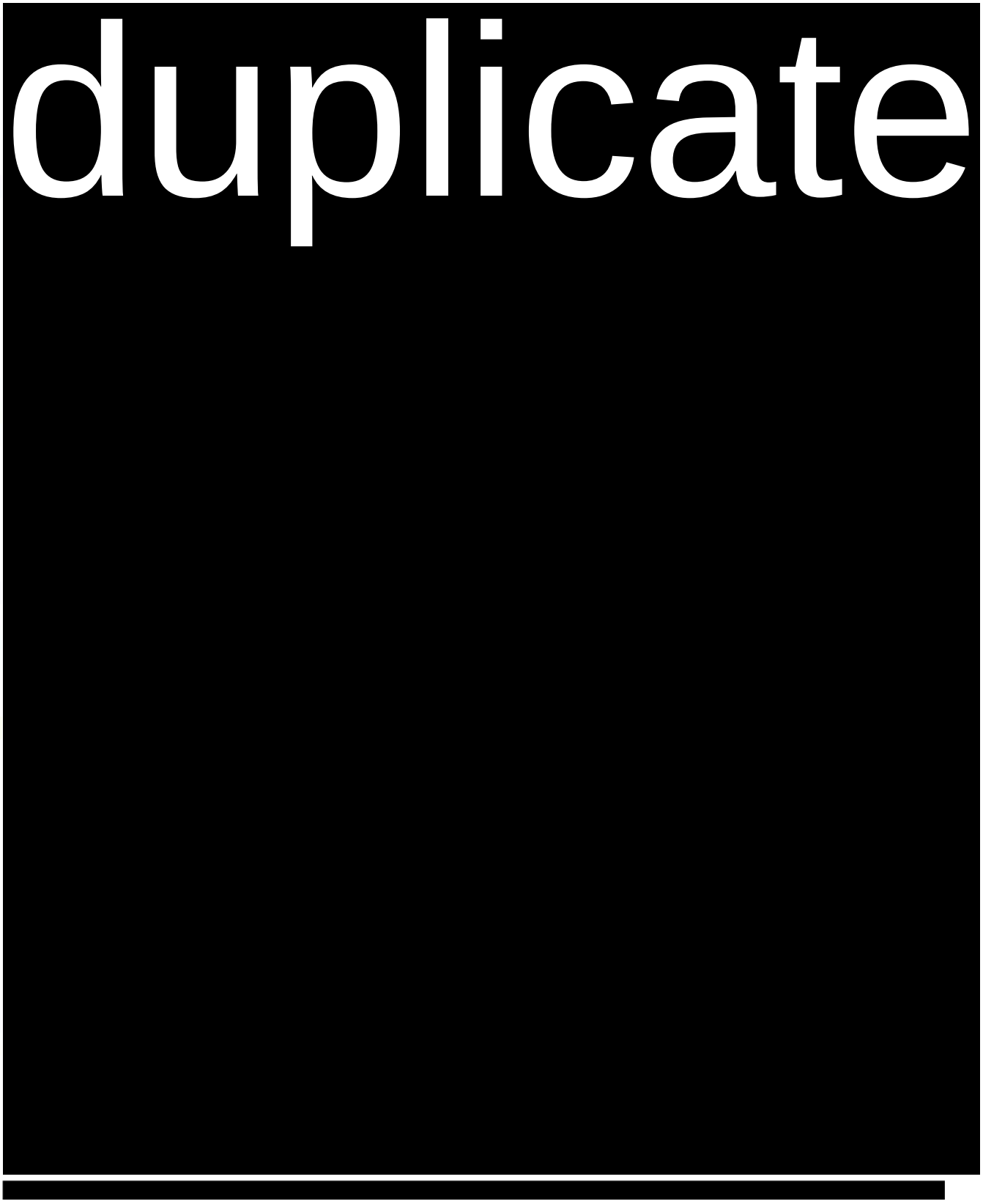
From: Colborn, Paul P
Sent: Saturday, June 23, 2007 6:43 PM
To: Bradbury, Steve
Cc: Eisenberg, John
Subject: Fw: Book

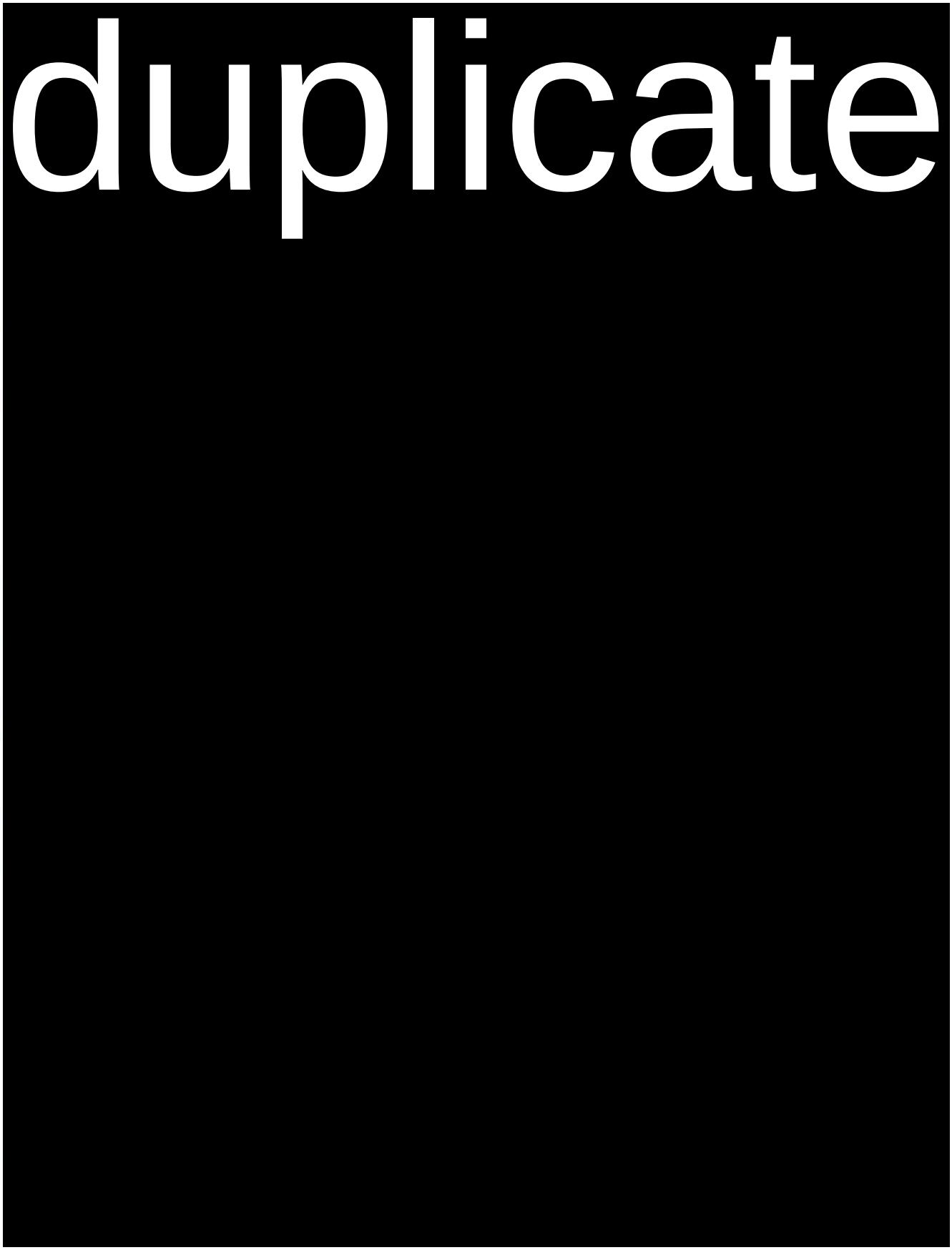
Fyi

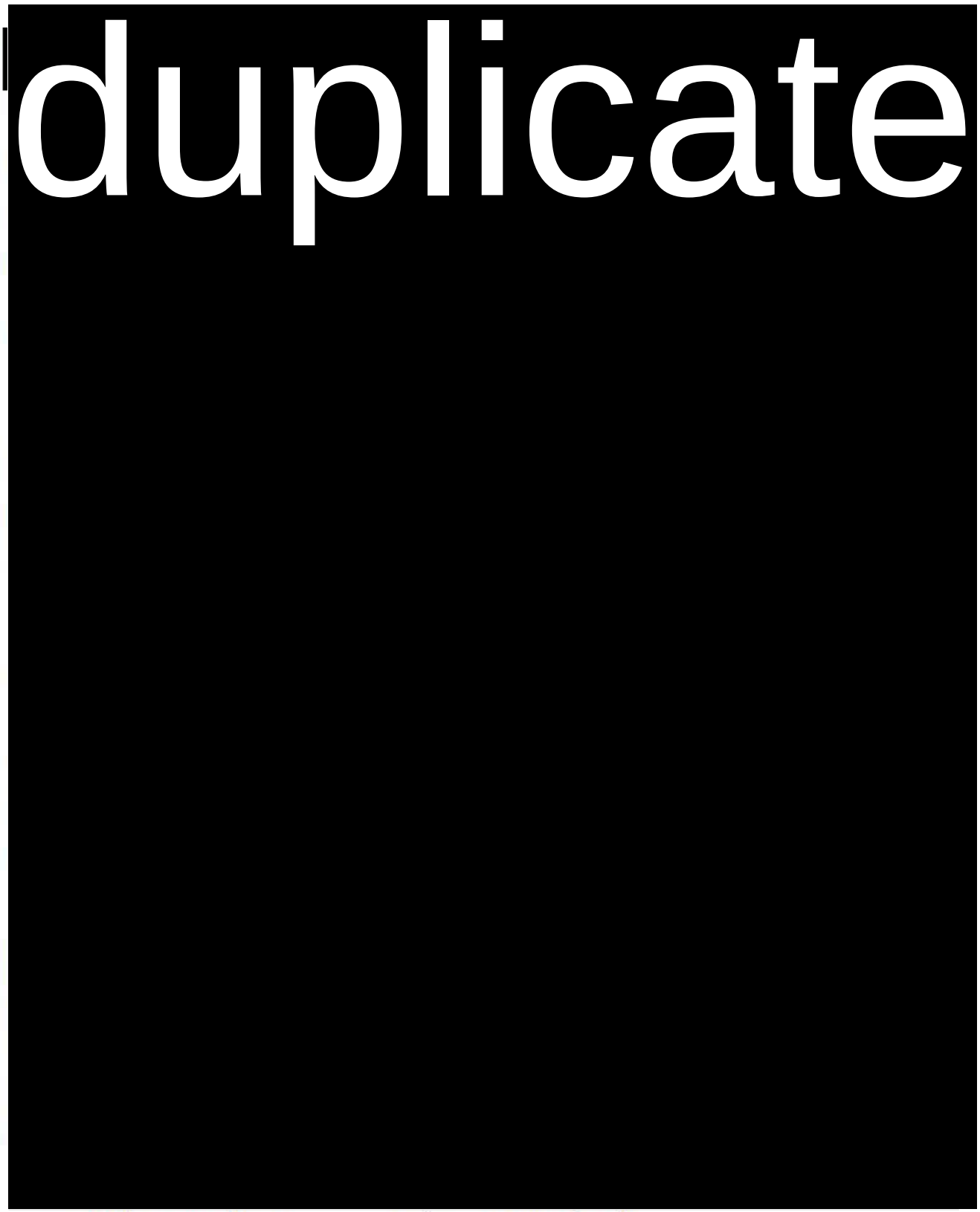
-----Original Message-----
From: Kennedy, Lionel
To: Eisenberg, John; Charlie Steele; Sessoms, GayLa; Colborn, Paul P
Sent: Sat Jun 23 18:31:08 2007











Colborn, Paul P

From: Colborn, Paul P
Sent: Monday, June 25, 2007 12:20 PM
To: Bradbury, Steve
Cc: Elwood, John
Subject: RE: Book

Will do. I'll run a draft of the email past you.

-----Original Message-----
From: Bradbury, Steve
Sent: Monday, June 25, 2007 12:18 PM
To: Colborn, Paul P
Cc: Elwood, John
Subject: Re: Book

Paul: [redacted (b) (5)]? Thx!

-----Original Message-----
From: Colborn, Paul P
To: Bradbury, Steve
CC: Elwood, John
Sent: Mon Jun 25 11:59:39 2007
Subject: FW: Book

Steve, [redacted (b) (5)] Have you heard anything from him recently?

From: Kennedy, Lionel
Sent: Monday, June 25, 2007 11:39 AM
To: 'Jack Goldsmith'
Subject: RE: Book

Hi Jack,

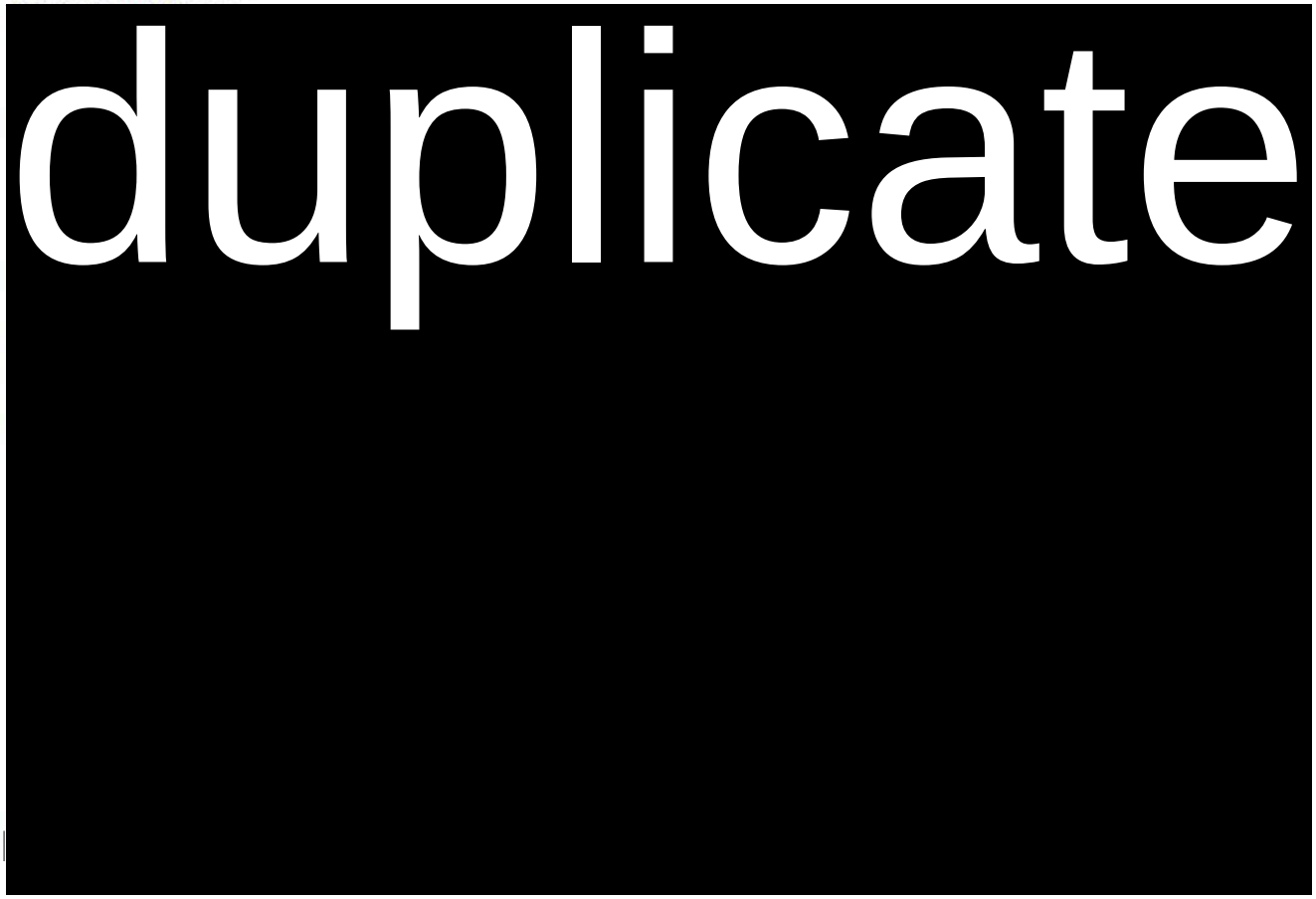
I've been out of the office for the past week. GayLa Sessoms has been coordinating the review for the front office. My understanding was that things were pretty far along as of 10 days ago. GayLa is out for her AWS day today; I believe she will be back tomorrow. I will check with her on the status then.

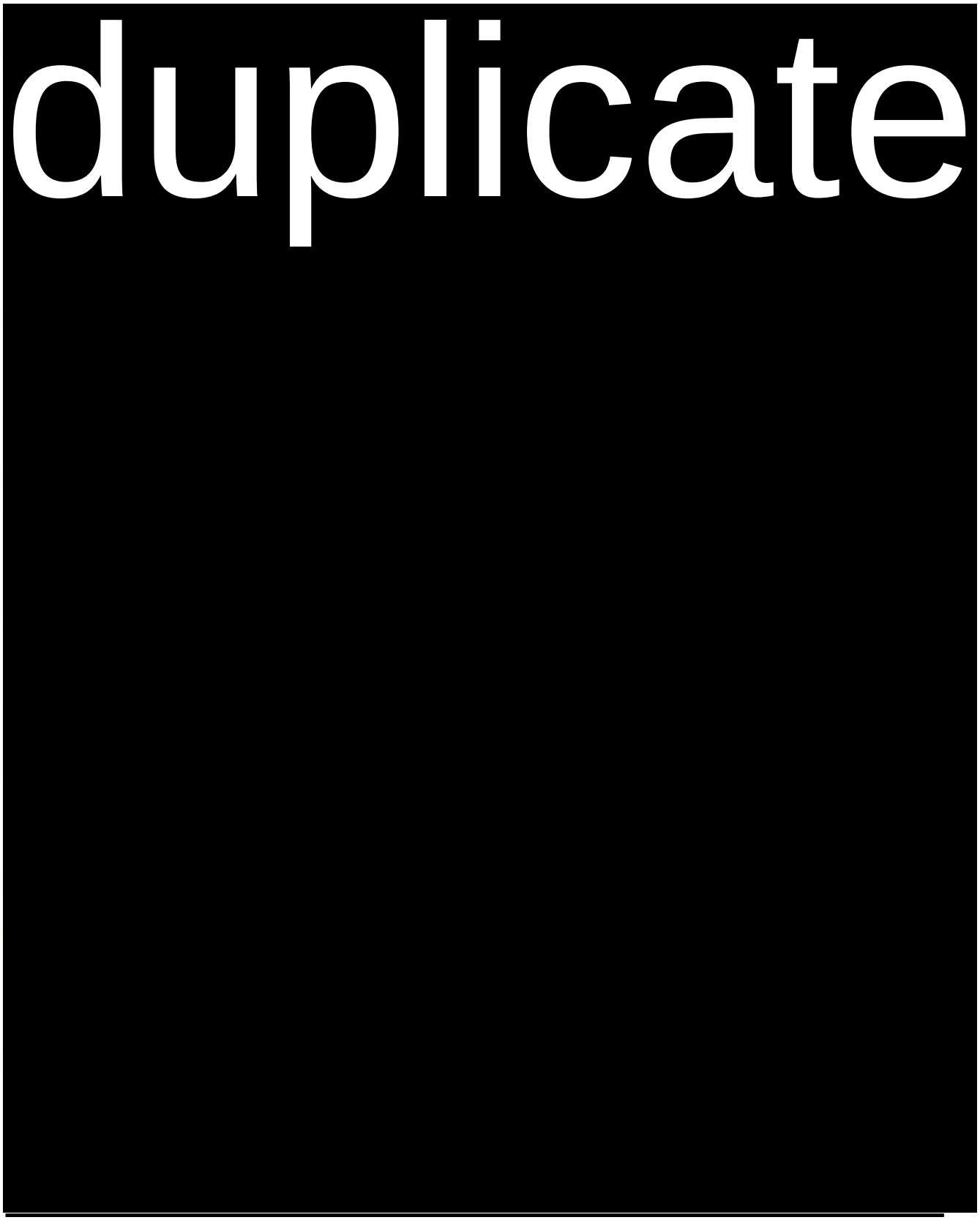
Re the calculation of the time period, GayLa had done a calculation. I don't know if she figured "day 30" exactly as you did, but I believe her calculation was pretty close to yours. With regard to the "implied consent" issue you raise, I'm skeptical that the Department's position would be the same as yours. However, I'm hoping that's an academic issue because we are able to provide a response to you shortly.

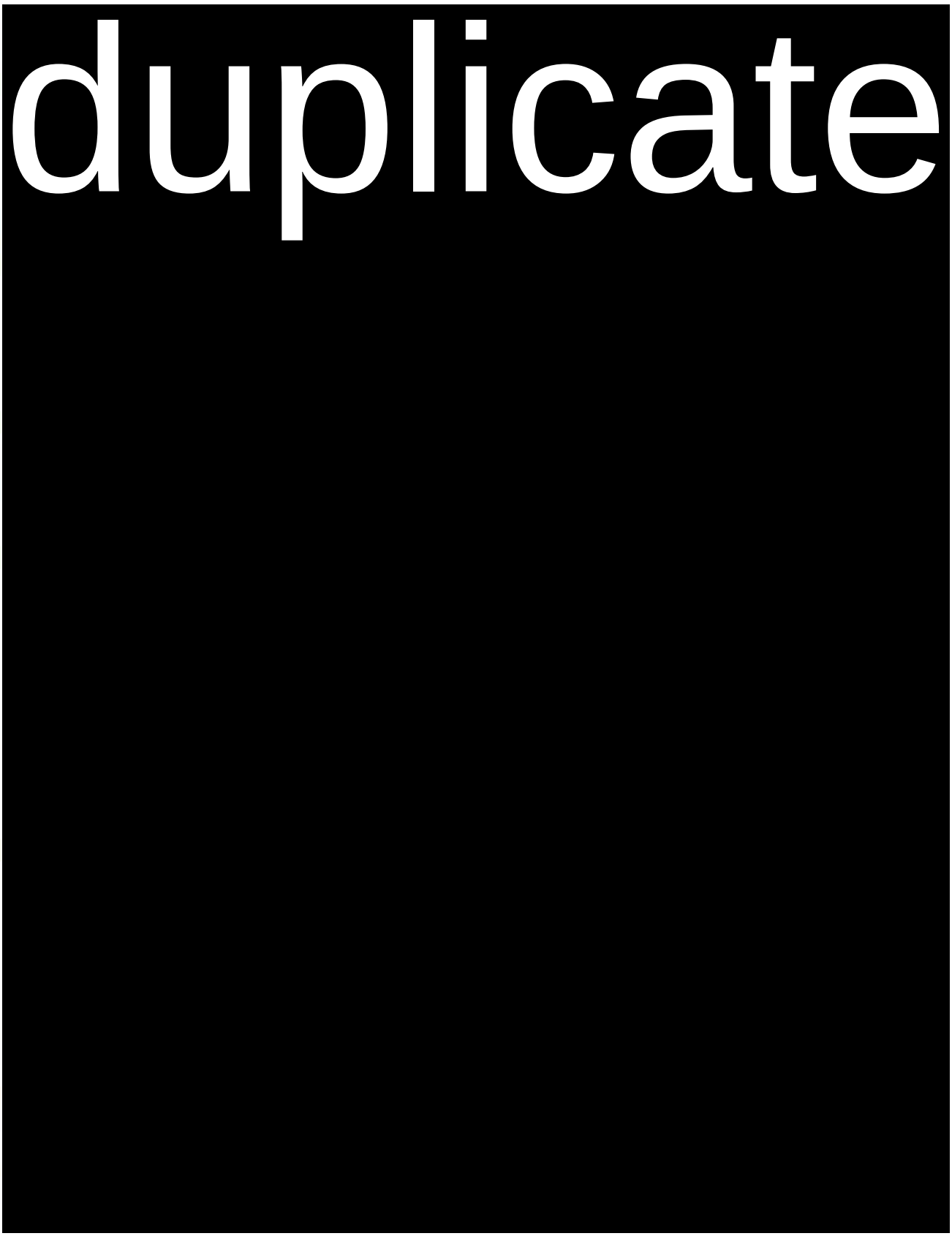
If you want to call me about this tomorrow or anytime please feel free to do so--what's above is what I know right now. My number is (b) (6) . Lionel

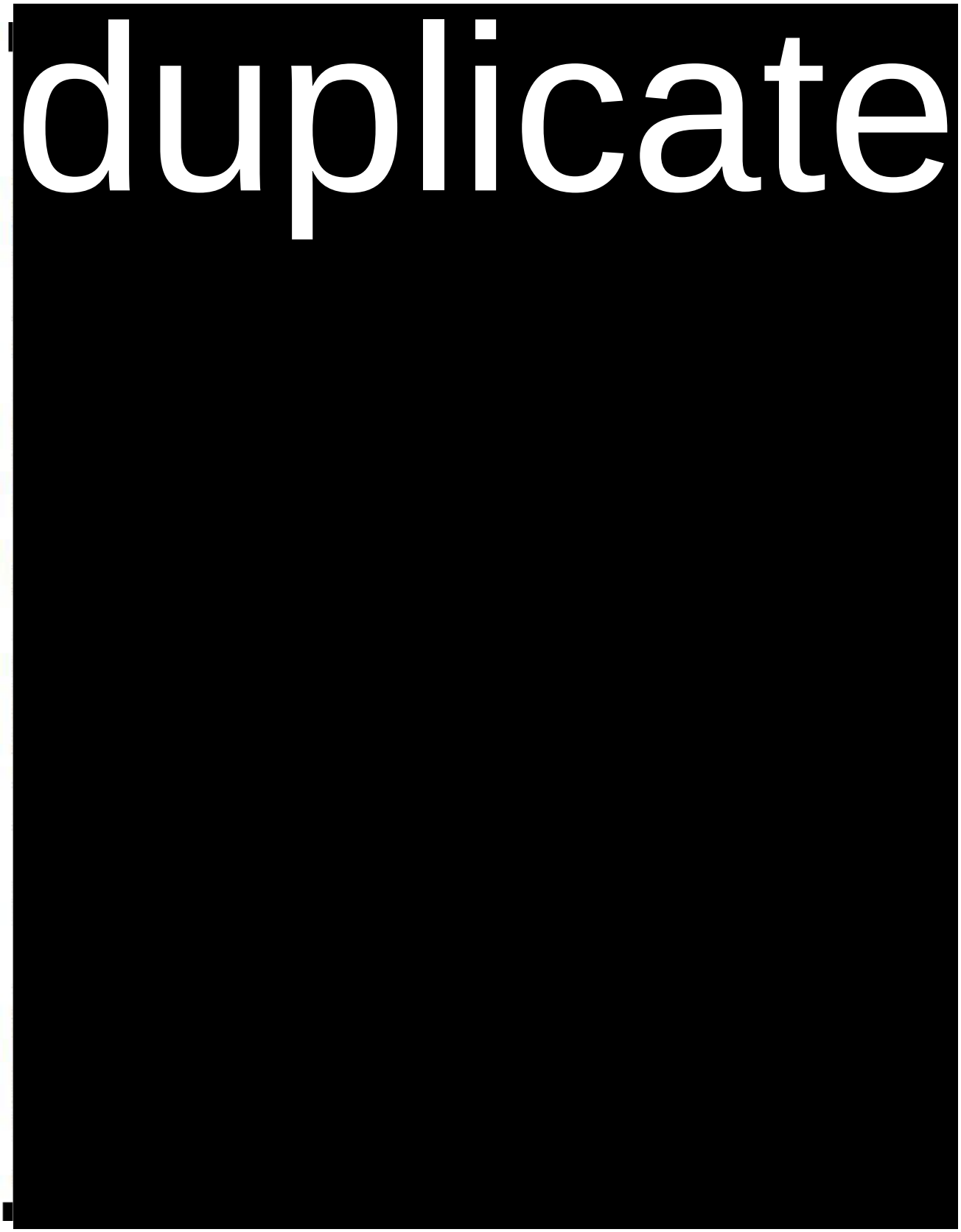
---

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Saturday, June 23, 2007 6:38 AM
To: Kennedy, Lionel





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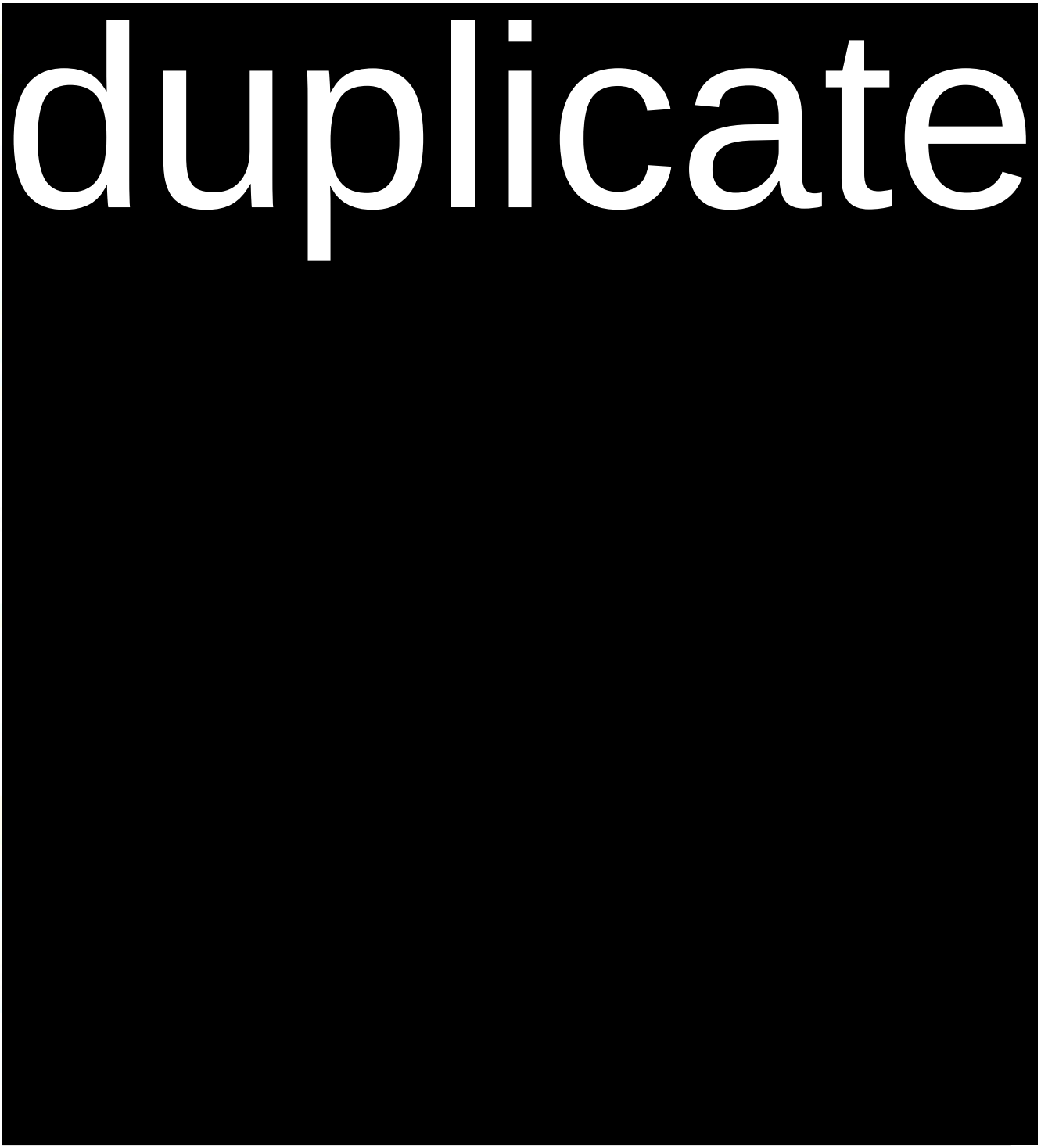

Bradbury, Steve

From: Bradbury, Steve
Sent: Monday, June 25, 2007 7:43 PM
To: Colborn, Paul P
Cc: Elwood, John
Subject: RE: Book

That's fine. Thx!

-----Original Message-----
From: Colborn, Paul P
Sent: Monday, June 25, 2007 7:12 PM
To: Bradbury, Steve
Cc: Elwood, John
Subject: RE: Book

HOW ABOUT THIS EMAIL REPLYING TO ALL TO LIONEL'S EMAIL, CC TO YOU:

(b) (5)

-----Original Message-----
From: Bradbury, Steve
Sent: Monday, June 25, 2007 12:18 PM
To: Colborn, Paul P
Cc: Elwood, John

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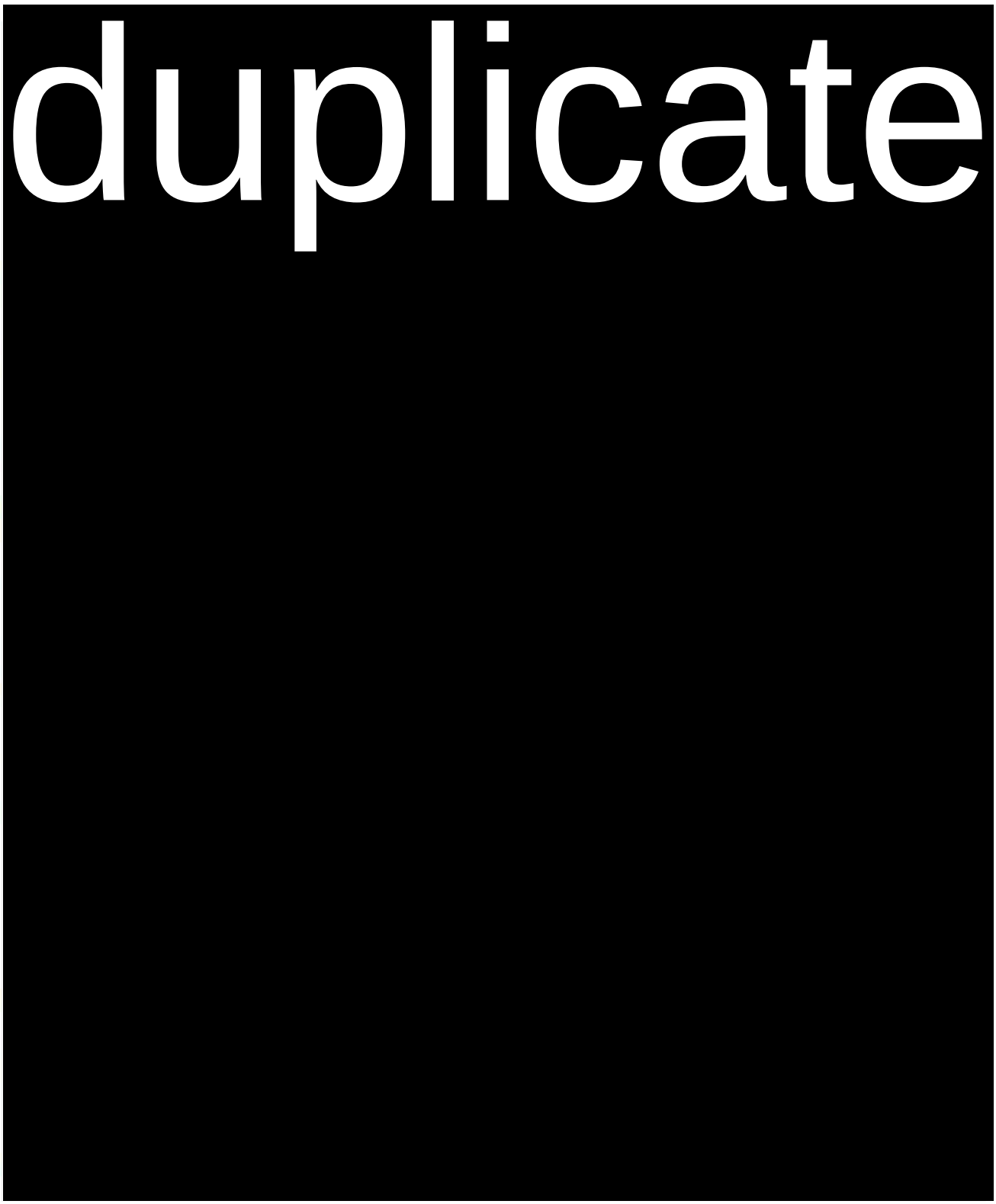
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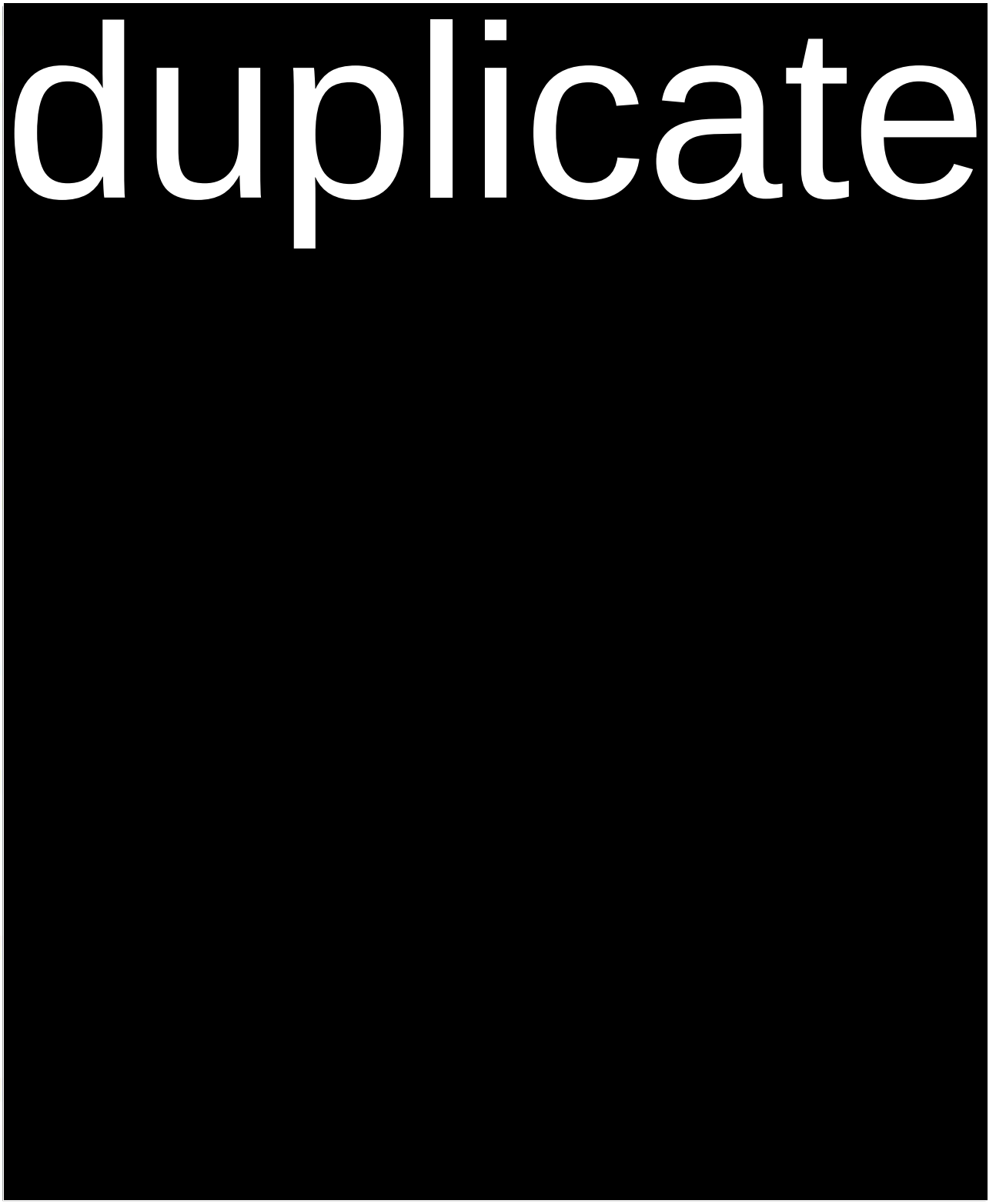

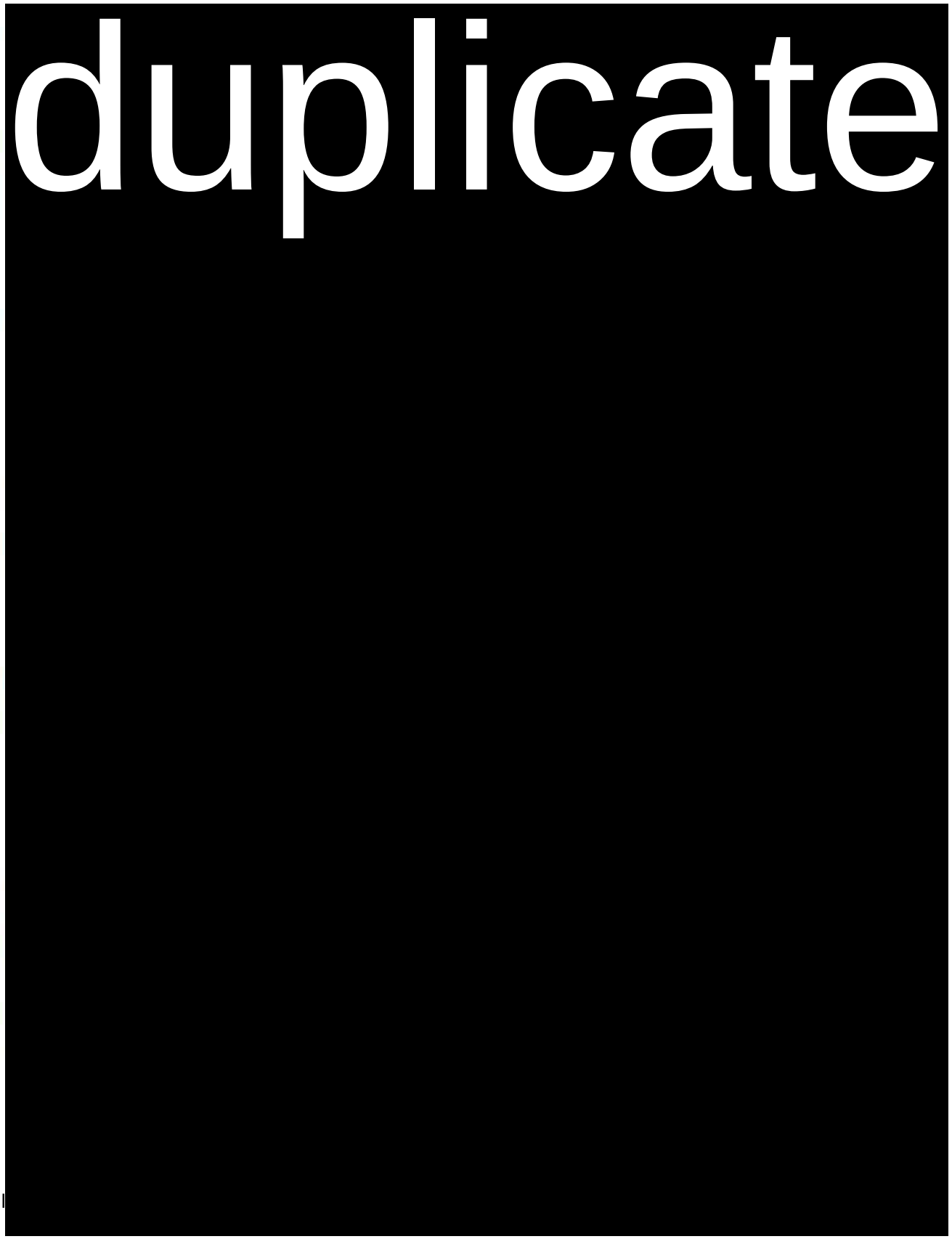
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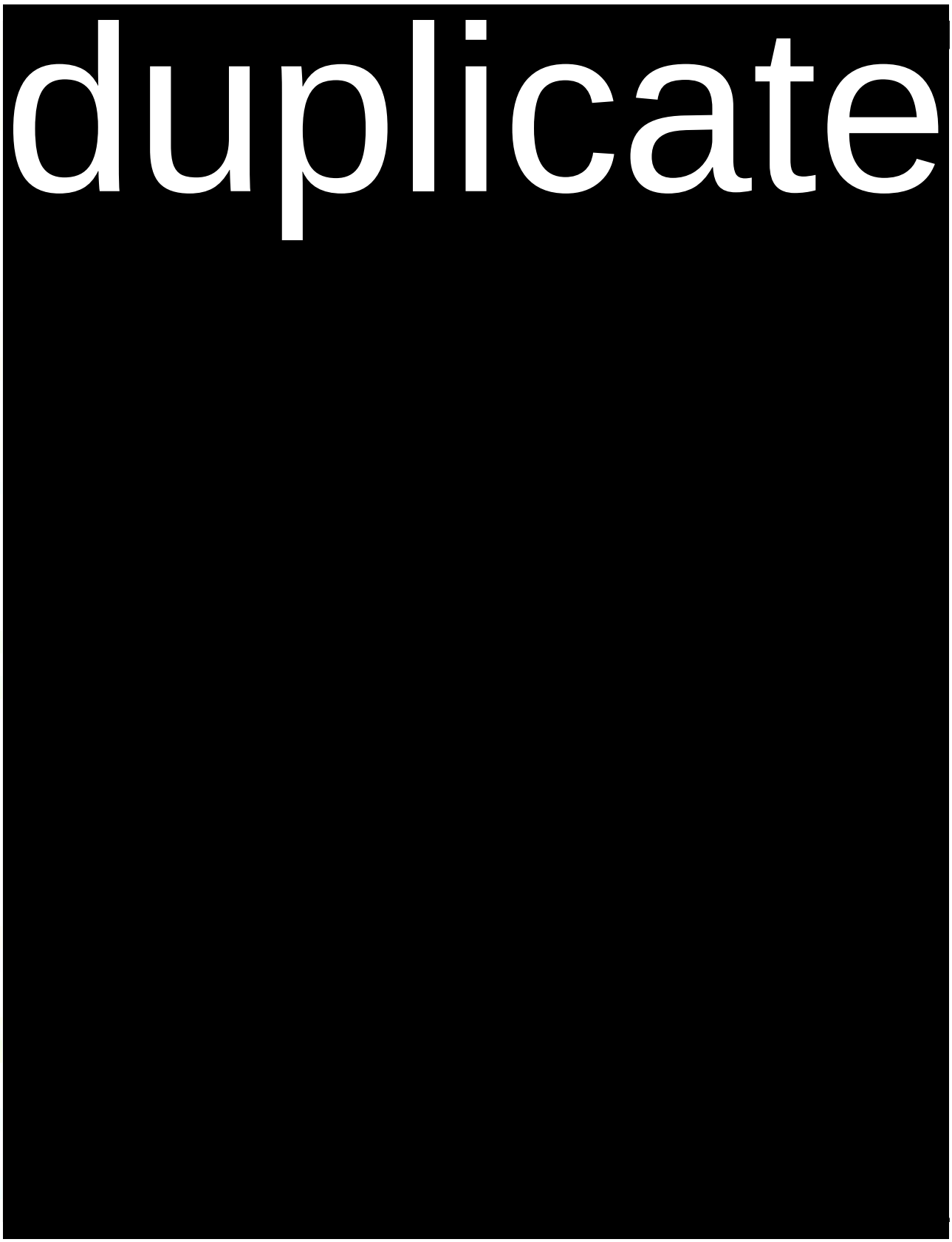
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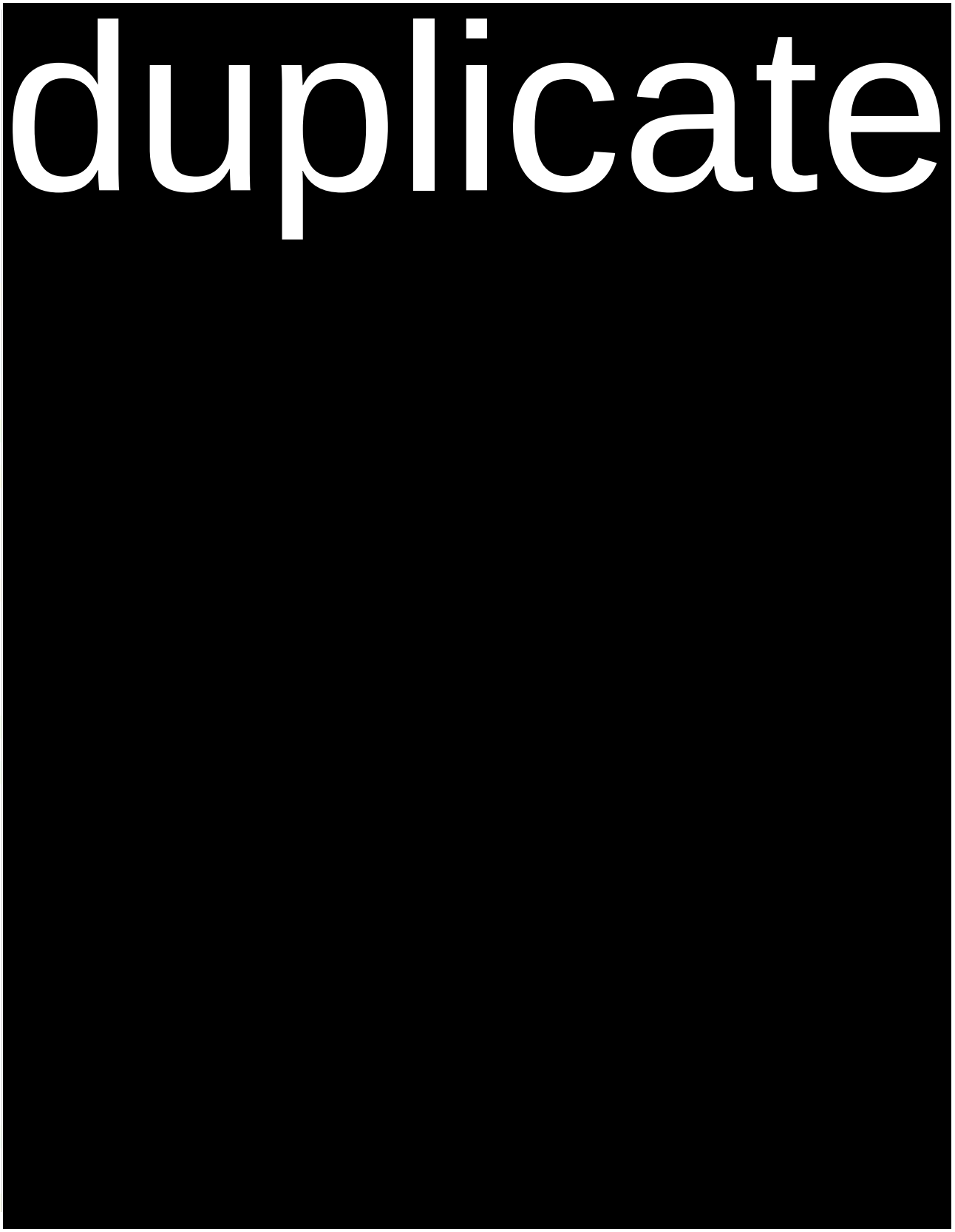


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Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, June 26, 2007 8:48 AM
To: Bradbury, Steve
Cc: Elwood, John
Subject: Fw: Book

Fyi.

I'll send my email to Jack as soon as I get in.

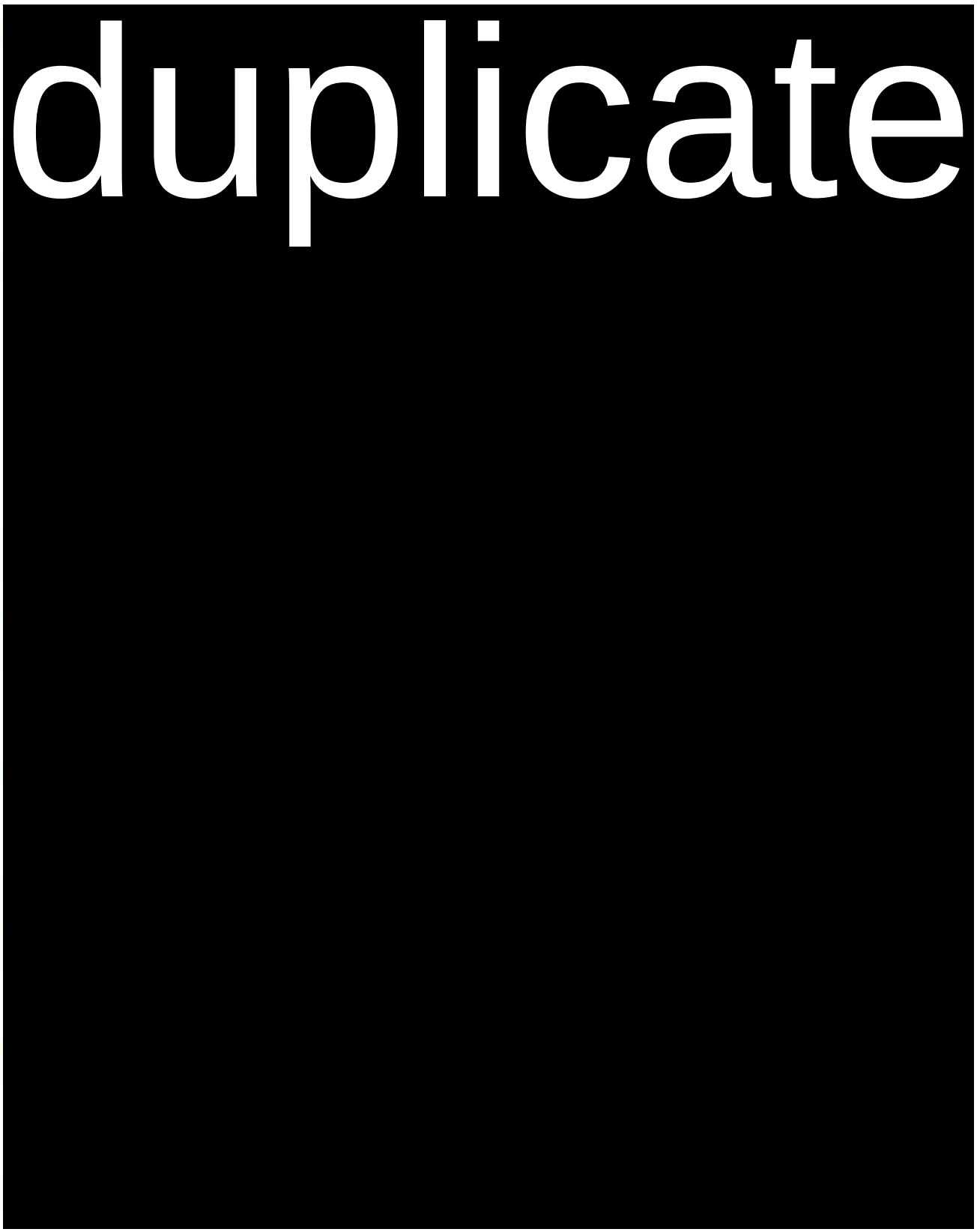
-----Original Message-----
From: Sessoms, GayLa
To: Kennedy, Lionel
CC: Eisenberg, John; Charlie Steele; Colborn, Paul P
Sent: Tue Jun 26 08:44:50 2007
Subject: RE: Book

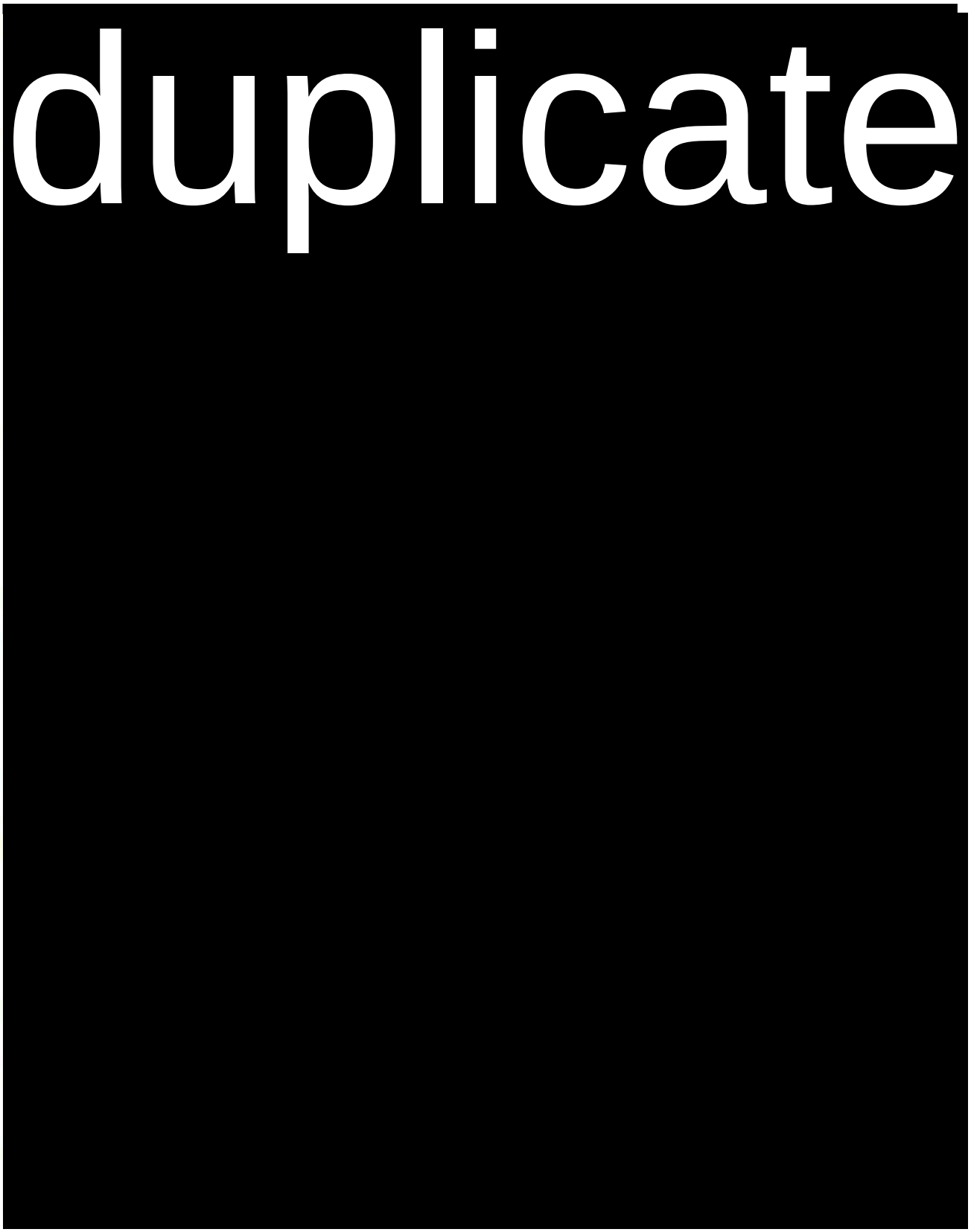
Hi: We have received comments from all equity holders except the Agency, and I have reached out to them on numerous occasions (including notice on Friday that our response is due this week). All other equity holders have cleared this manuscript. At the Bureau's request, Goldsmith agreed to remove the agent's names (referenced in the postscript). The draft response is ready for your review and Charlie's signature. FYI, Thursday is the end of the 30 day period. GayLa

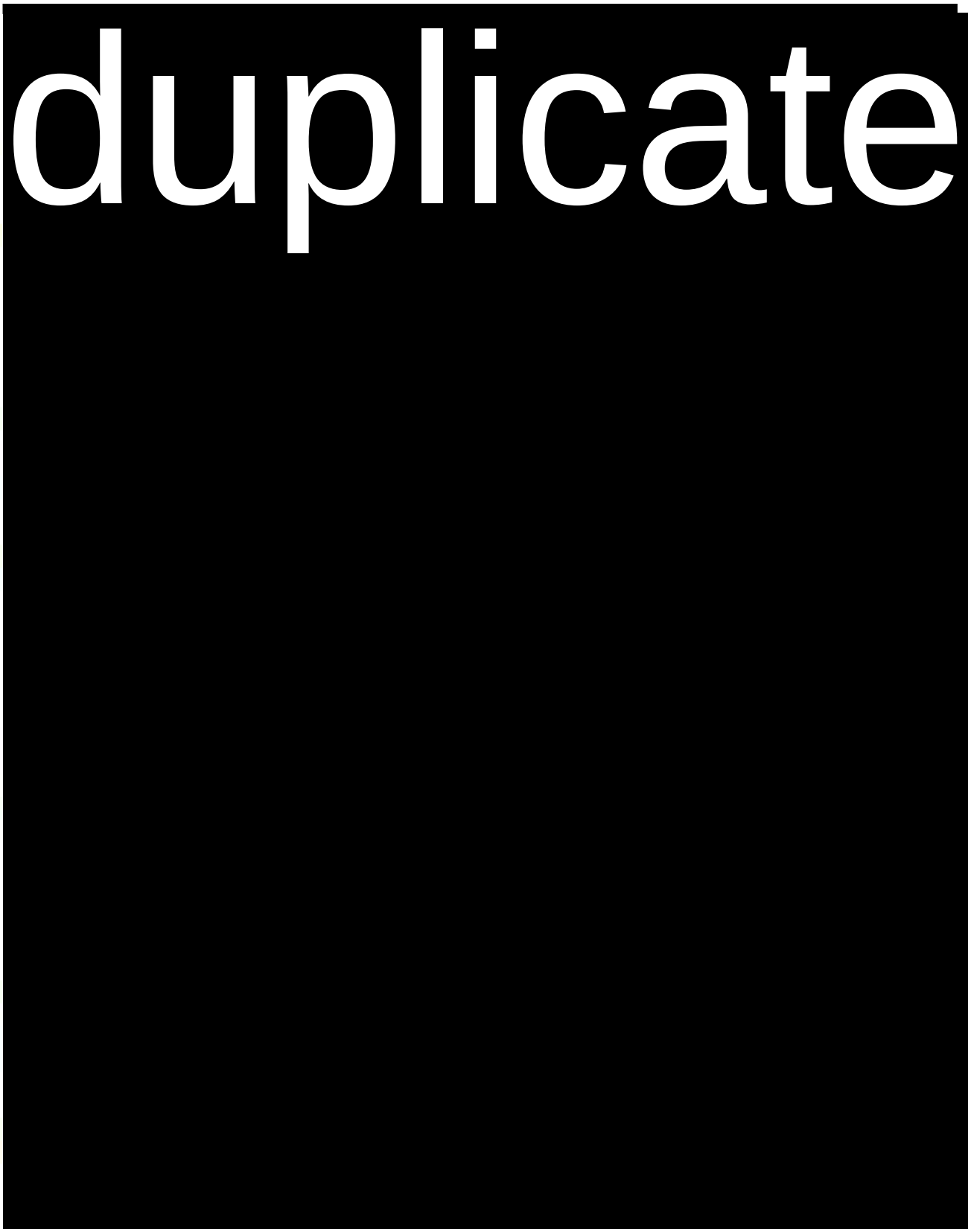
-----Original Message-----
From: Kennedy, Lionel
Sent: Saturday, June 23, 2007 6:31 PM
To: Eisenberg, John; Charlie Steele; Sessoms, GayLa; Colborn, Paul P
Subject: Fw: Book

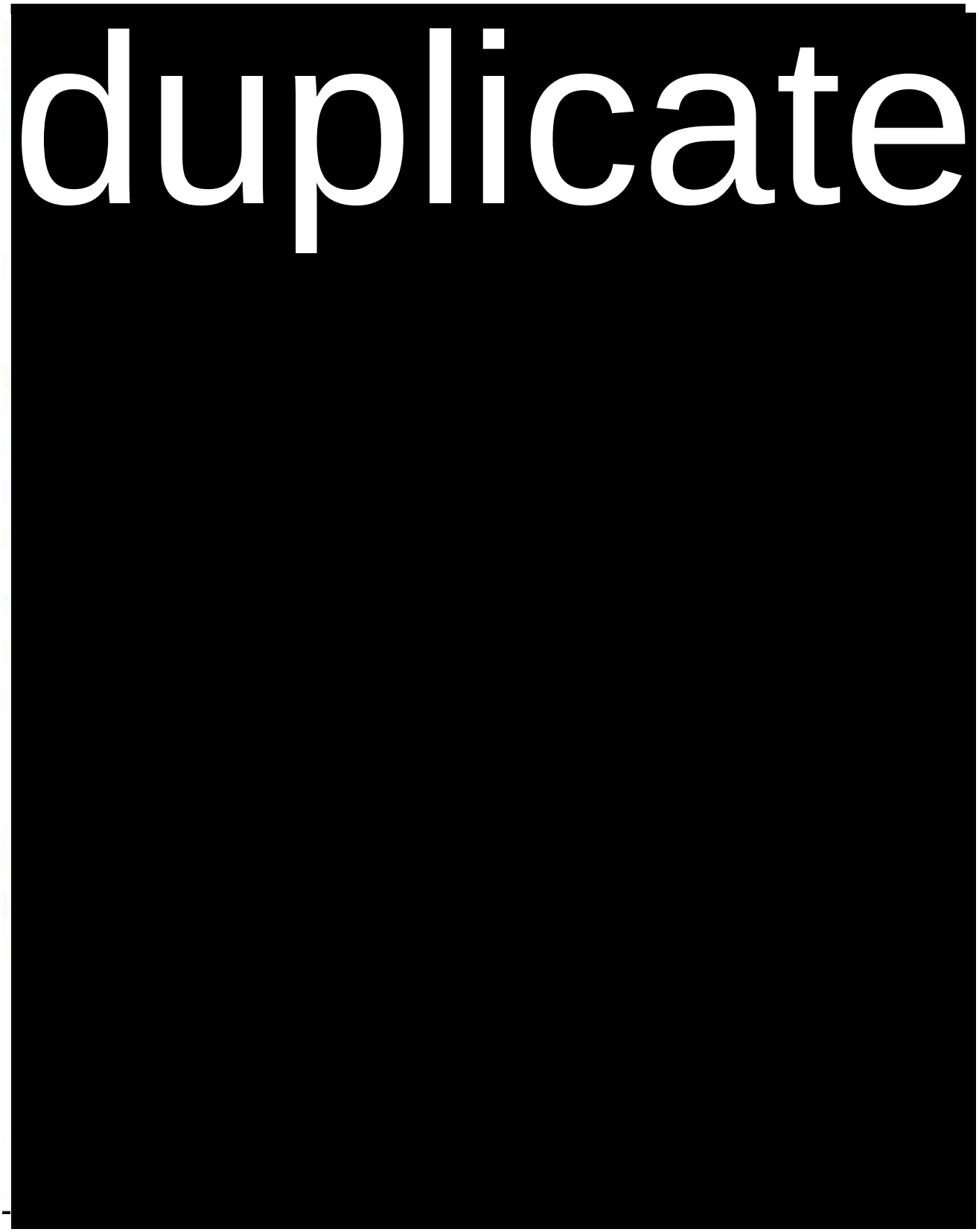
Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Kennedy, Lionel
Sent: Sat Jun 23 06:37:43 2007
Subject: RE: Book








duplicate


duplicate

Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, June 26, 2007 11:24 AM
To: Colborn, Paul P
Subject: Re: Book

No.

-----Original Message-----
From: Colborn, Paul P
To: Bradbury, Steve
Sent: Tue Jun 26 11:14:02 2007
Subject: FW: Book

Steve, do you know about the NSC reviewing the manuscript? Any concerns?

From: Sessoms, GayLa
Sent: Tuesday, June 26, 2007 11:13 AM
To: Colborn, Paul P; Kennedy, Lionel
Cc: Steele, Charles (NSD)
Subject: RE: Book

FYI, I just received a call from the NSC (Mary Ronan) inquiring about whether DOJ had received Goldsmith's manuscript and requesting a copy. A courier is picking it up today. GayLa

---

From: Colborn, Paul P
Sent: Tuesday, June 26, 2007 11:09 AM
To: Kennedy, Lionel
Cc: Sessoms, GayLa; Steele, Charles (NSD)
Subject: RE: Book

Correct.

From: Kennedy, Lionel
Sent: Tuesday, June 26, 2007 11:06 AM
To: Colborn, Paul P
Cc: Sessoms, GayLa; Steele, Charles (NSD)
Subject: RE: Book

Paul--thanks for keeping us in the loop. I assume that whatever equities there are (White House etc) in the privileged information OLC's review encompasses them. thx, Lionel

---

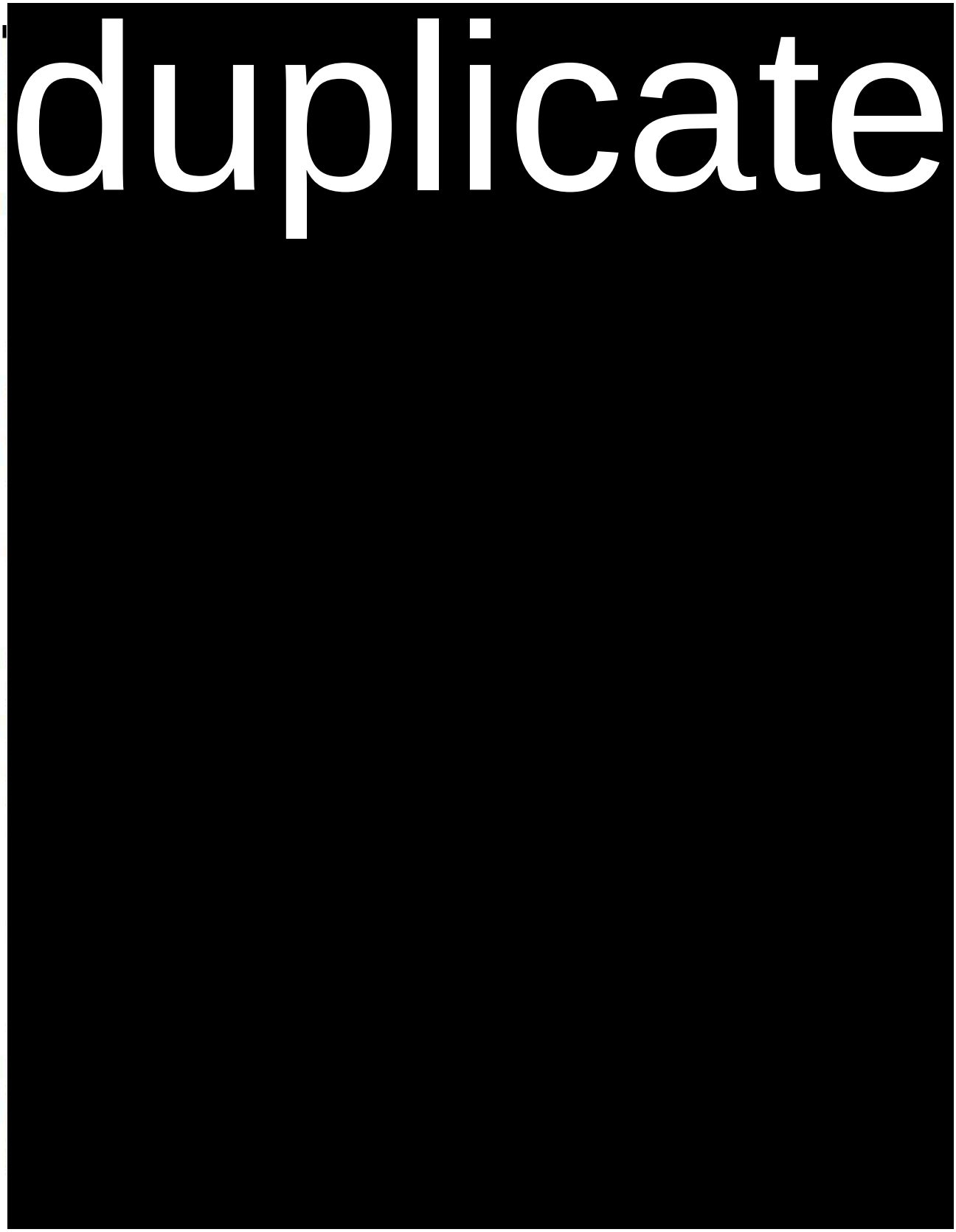
From: Colborn, Paul P
Sent: Tuesday, June 26, 2007 9:48 AM
To: Kennedy, Lionel; 'Jack Goldsmith'
Cc: Bradbury, Steve
Subject: RE: Book

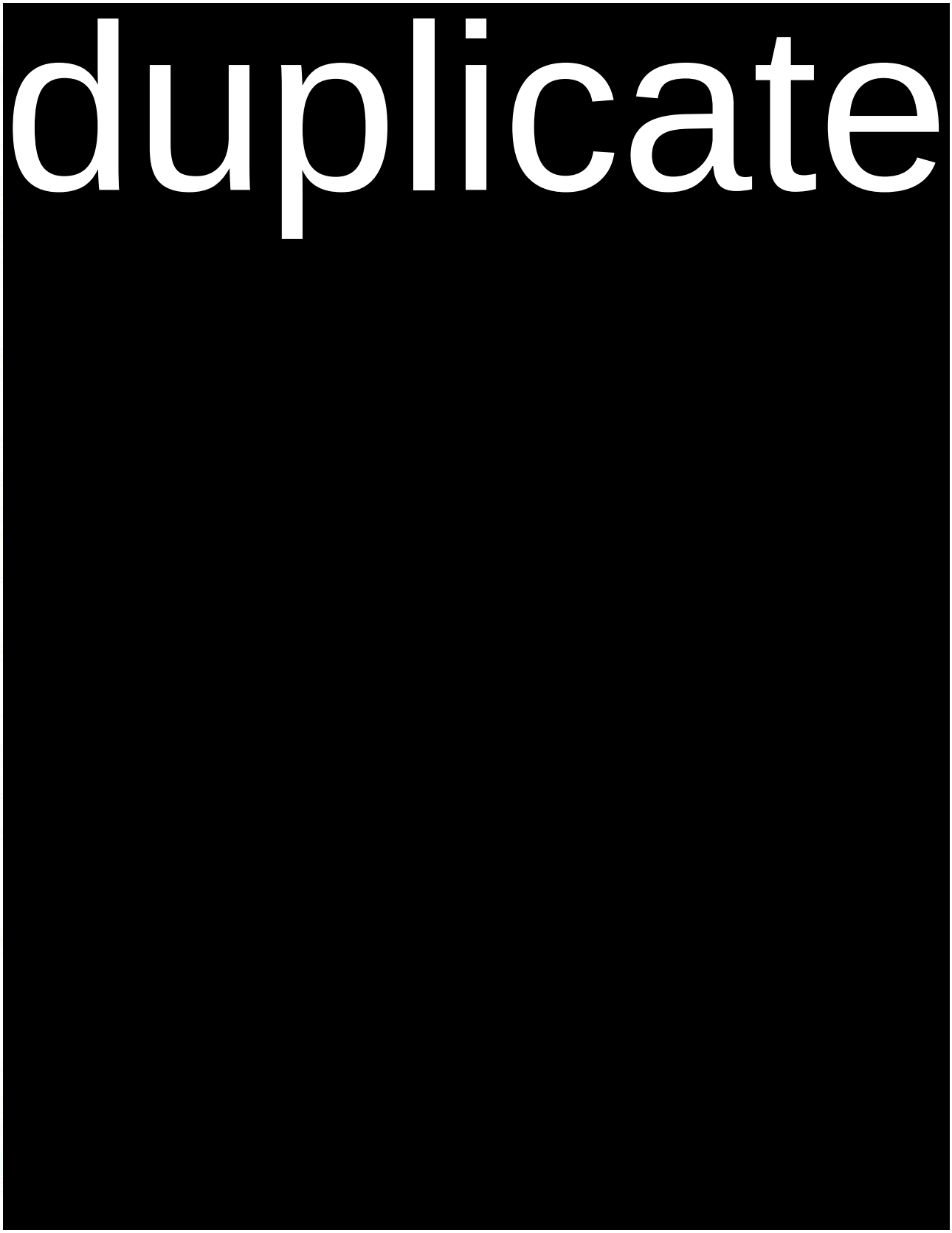
Could I add, Jack, that NSD's review for the Department of course is limited to looking for classified information. OLC's review for privileged information is being handled separately, directly between OLC and you. Will you be responding soon to the concerns Steve raised?

Best regards.

Paul

From: Kennedy, Lionel
Sent: Monday, June 25, 2007 11:39 AM
To: 'Jack Goldsmith'

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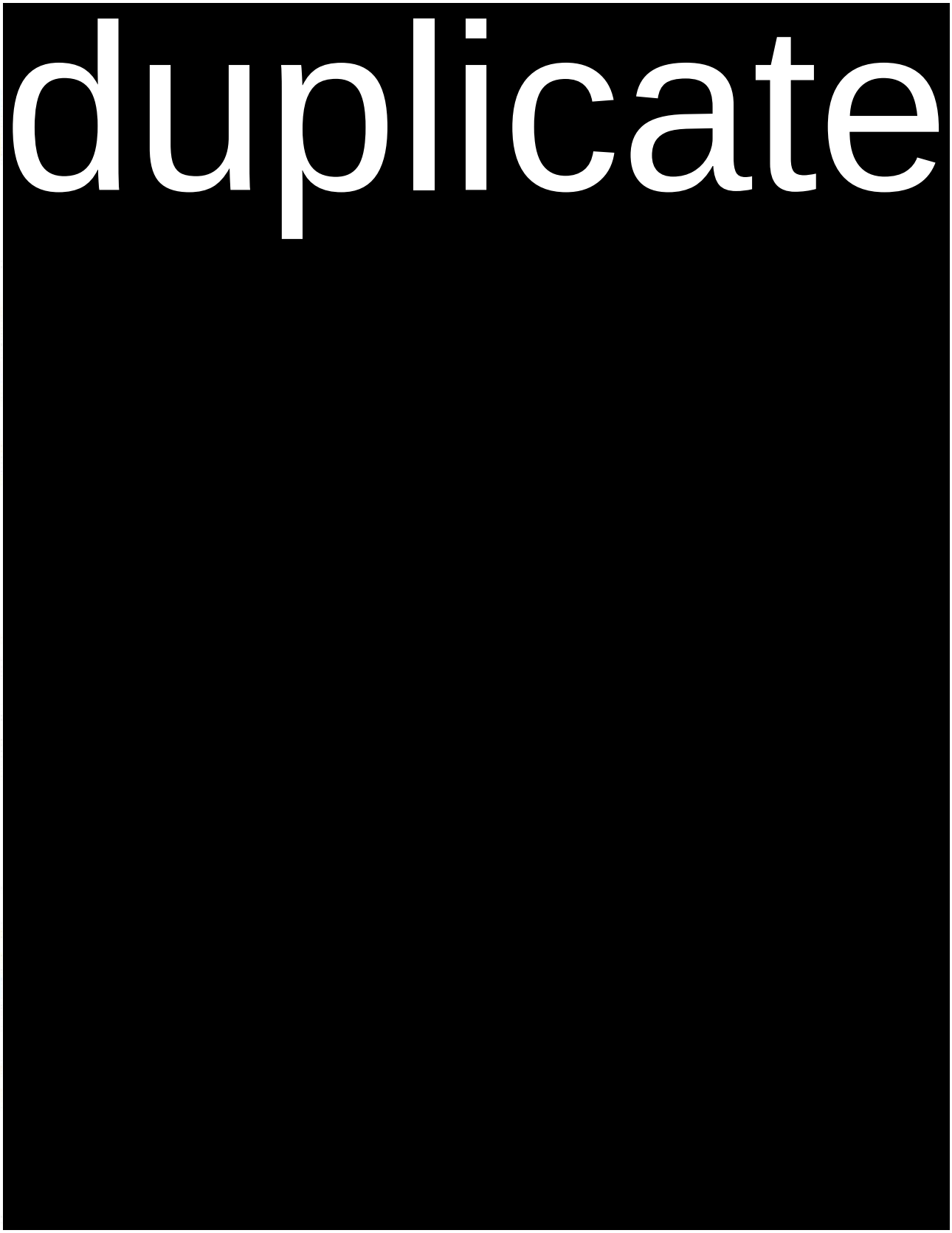

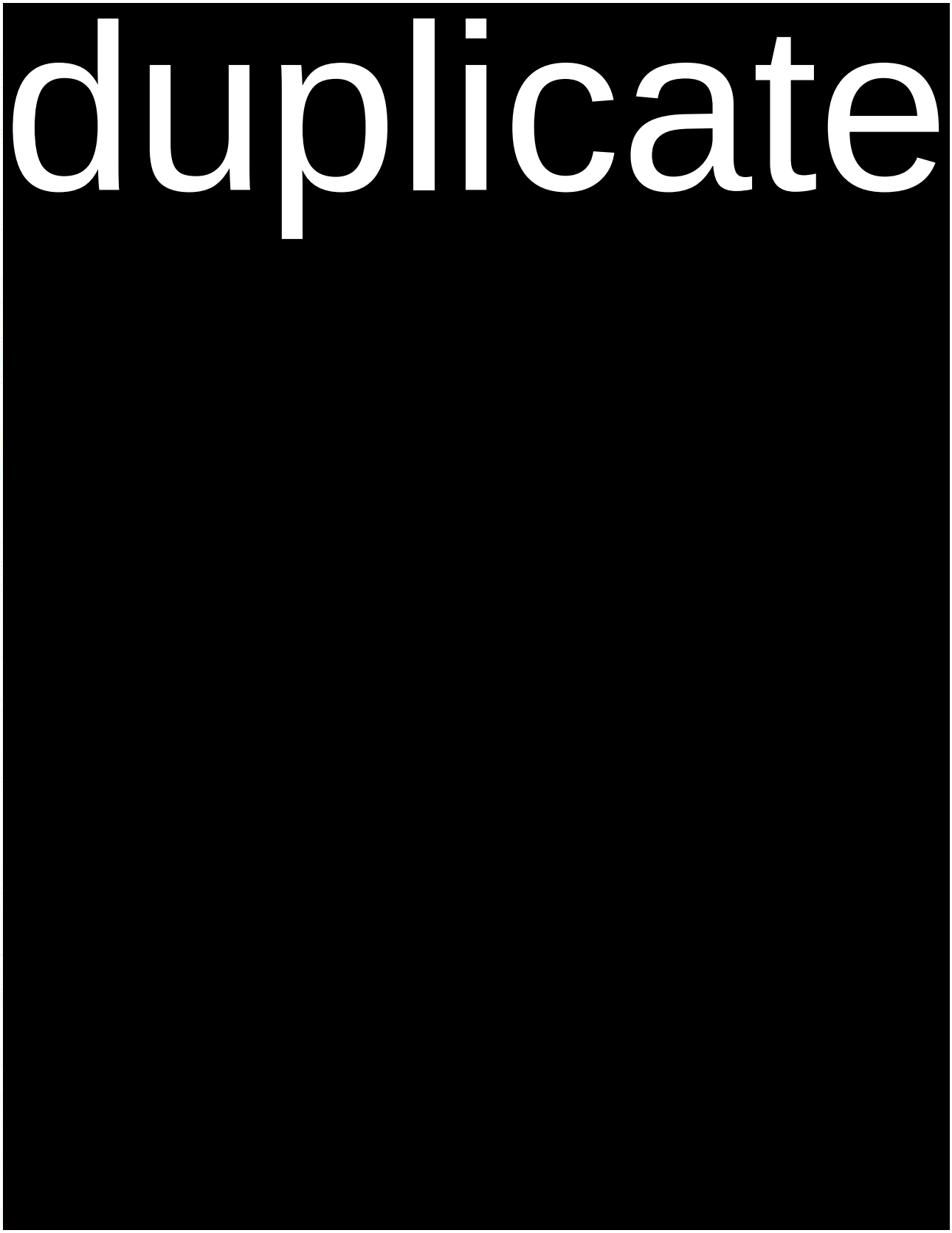
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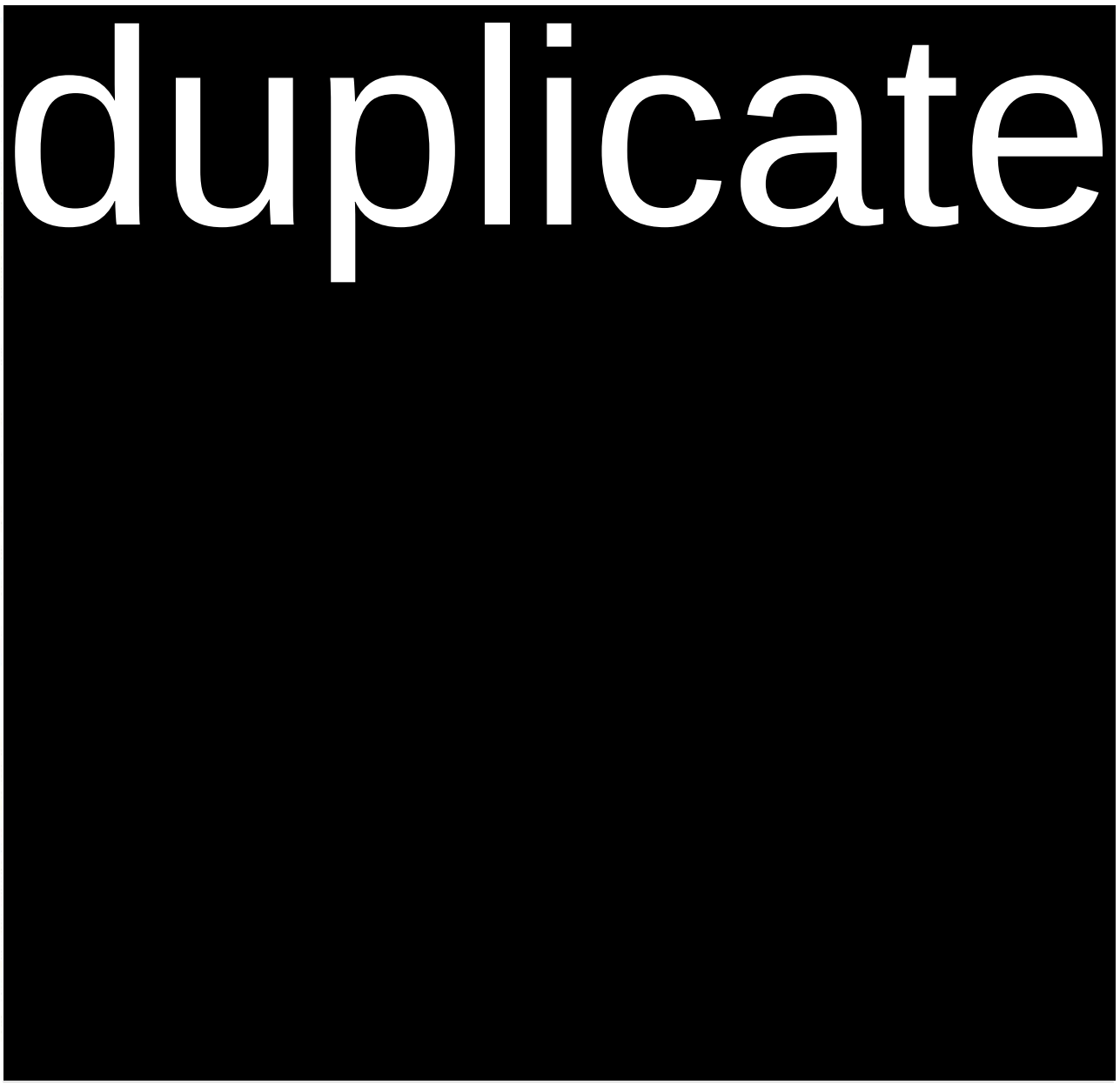
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Colborn, Paul P

From: Colborn, Paul P
Sent: Wednesday, June 27, 2007 7:05 PM
To: 'jgoldsmith@law.harvard.edu'; Kennedy, Lionel
Cc: Bradbury, Steve
Subject: Re: Book

Thanks!

-----Original Message-----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Colborn, Paul P; Kennedy, Lionel
CC: Bradbury, Steve
Sent: Wed Jun 27 18:09:59 2007
Subject: RE: Book

Hi Paul. I'm sorry for the delay in responding. I am going to wait to hear from Lionel before deciding how to proceed. I'll be in touch then. Thanks, Jack

---

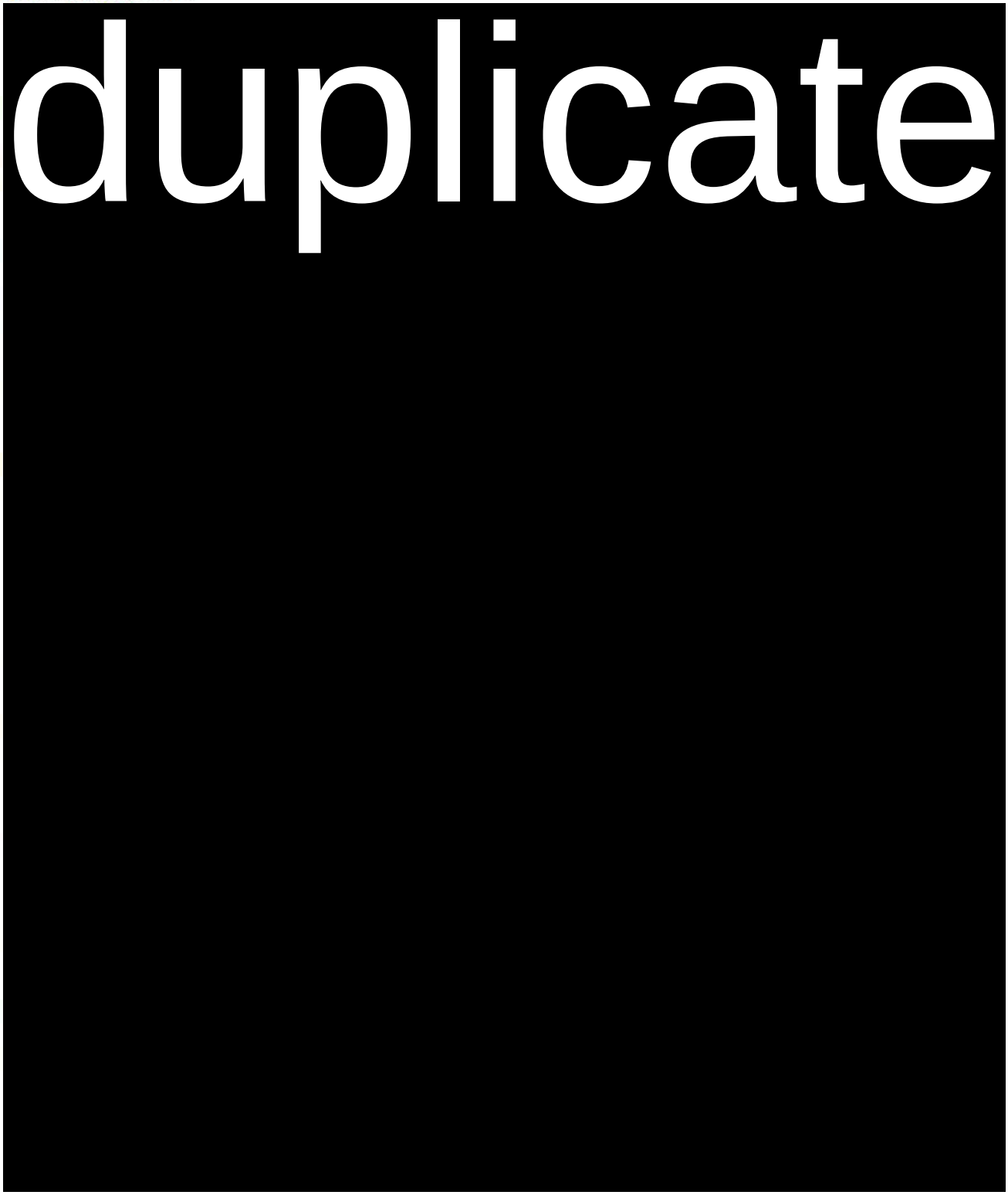
From: Colborn, Paul P [mailto:Paul.P.Colborn@usdoj.gov]
Sent: Tue 6/26/2007 9:47 AM
To: Kennedy, Lionel; Jack Goldsmith
Cc: Bradbury, Steve
Subject: RE: Book

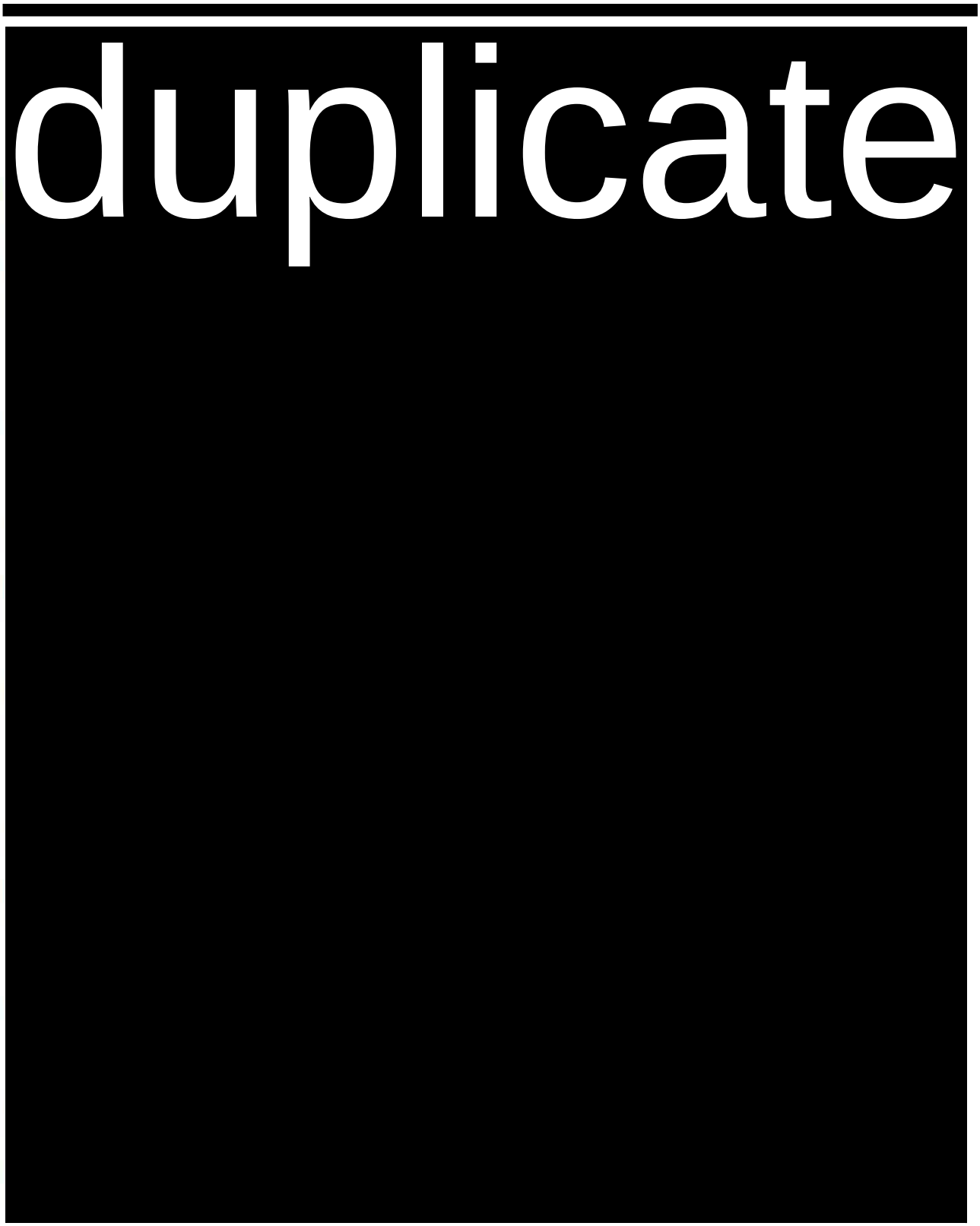
Could I add, Jack, that NSD's review for the Department of course is limited to looking for classified information. OLC's review for privileged information is being handled separately, directly between OLC and you. Will you be responding soon to the concerns Steve raised?

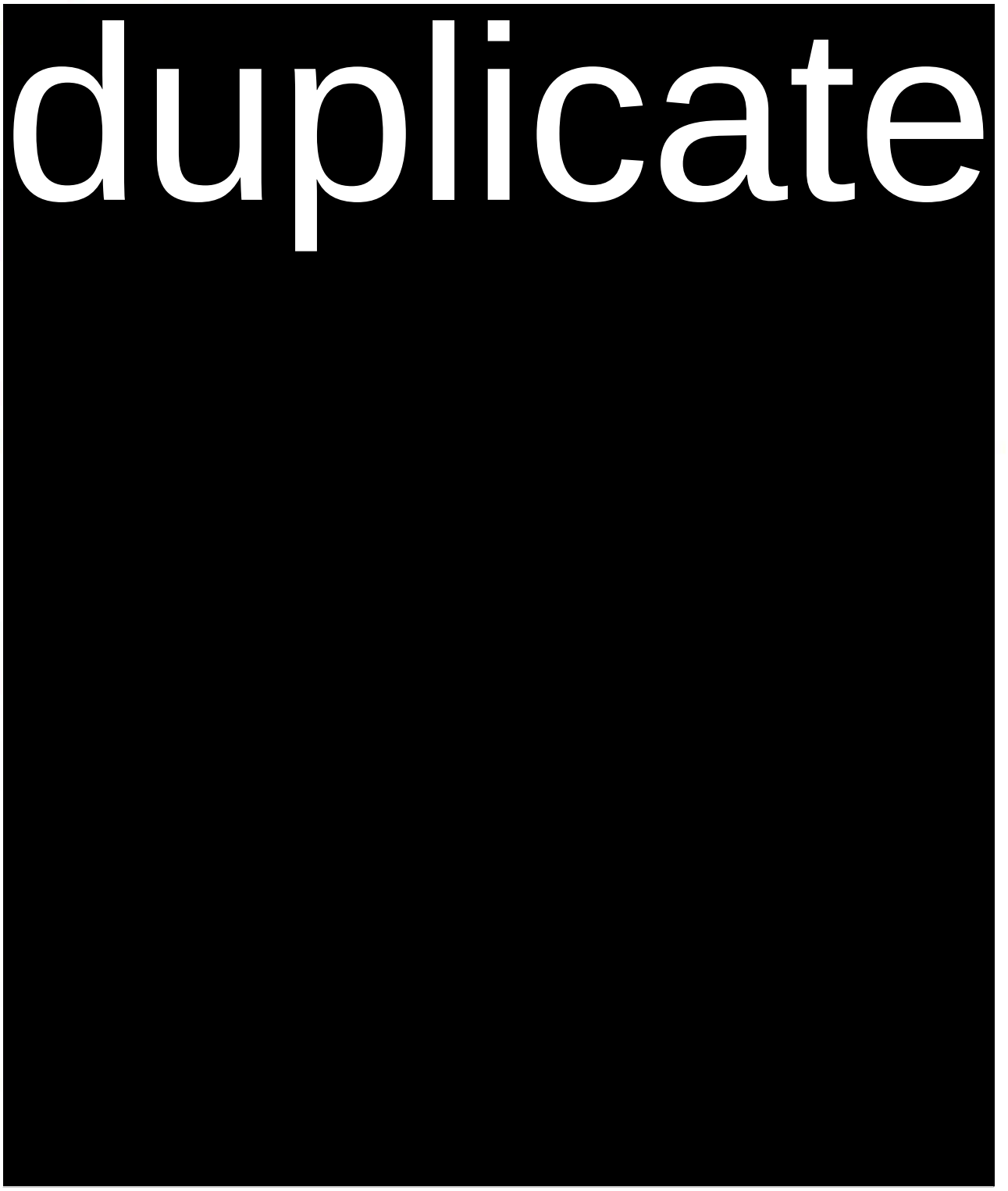
Best regards.

Paul

From: Kennedy, Lionel
Sent: Monday, June 25, 2007 11:39 AM
To: 'Jack Goldsmith'







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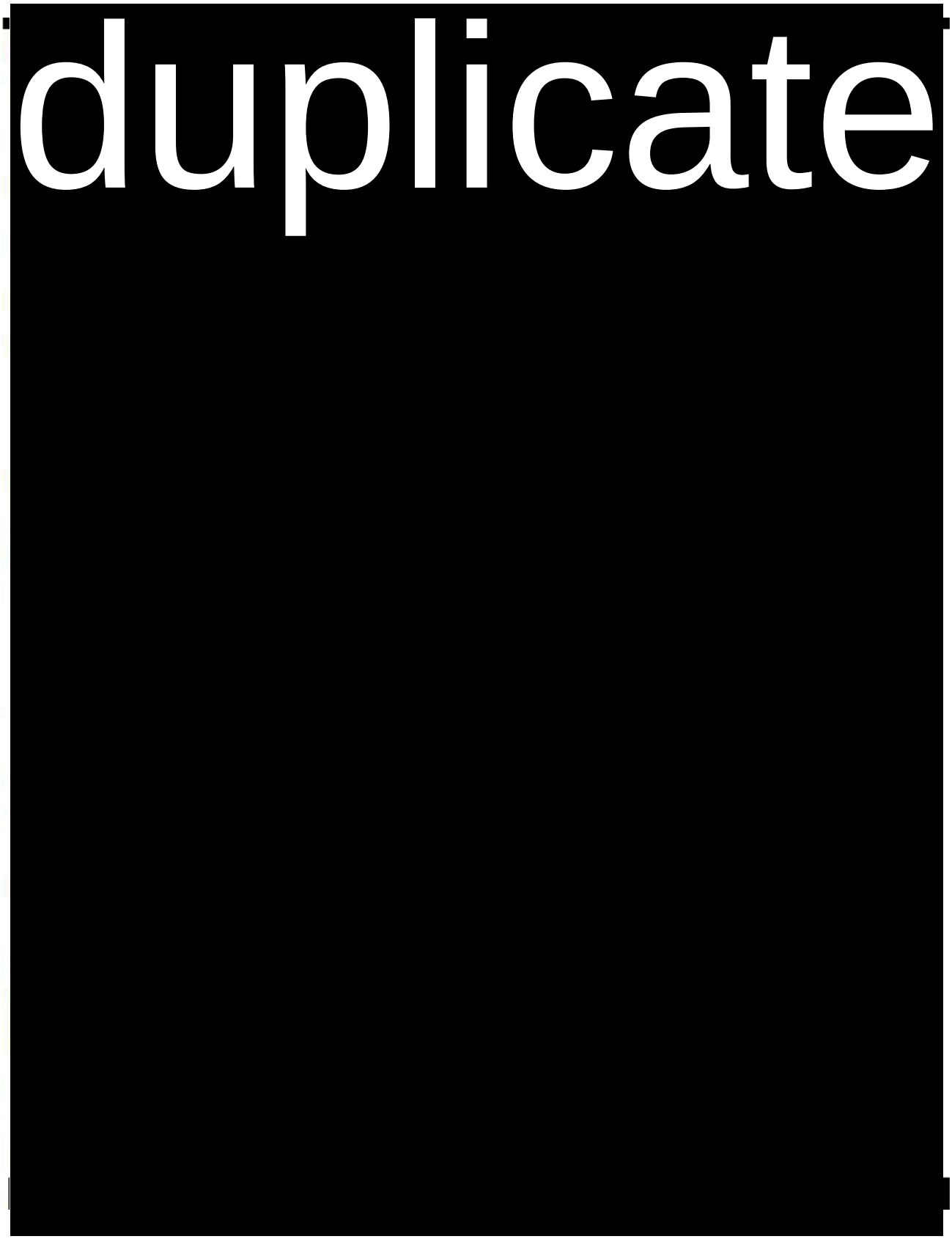


duplicate

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Thursday, June 28, 2007 11:53 AM
To:	Bradbury, Steve; Elwood, John
Subject:	FW: Various re Book

fyi

From: Kennedy, Lionel
Sent: Thursday, June 28, 2007 11:44 AM
To: 'Jack Goldsmith'
Cc: Sessoms, GayLa
Subject: RE: Various re Book

Jack--this is where we are with other agencies:

--FBI and other DoJ components did not request changes for classification.
--NSA looked at and did not request changes for classifcation.
--CIA--GayLa and I are working on getting response. Yes, they've had it since May.
--NSC just asked for a copy. I don't anticipate classification issue there, but not to say that there couldn't be one.
--DoD--you know status.

The non-classification part you are working with OLC.

Lionel

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Wednesday, June 27, 2007 4:41 PM
To: Kennedy, Lionel
Subject: RE: Various re Book

Two words are out.

Can I hear what the other agencies said asap? They have had their 6 weeks, no?

Thanks ,

Jack

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Wed 6/27/2007 3:32 PM
To: Jack Goldsmith
Cc: Sessoms, GayLa
Subject: Various re Book

Jack-

1) Book has gone to DoD. It was forwarded to David Riedel. POC there (person to whom GayLa spoke) was Mark Langerman--703 696-4545. I have no problem with your calling Haynes and asking him to expedite. Reason we

delayed in sending it there was because DoD wanted "everything at one time." Now we know what the nature of chapter 6 is we have been able to do that for them.

2) I will assume that the one two word reference we discussed is coming out. If you want a formal classification determination on that, let me know and I will get that. It will not delay things.

thx, Lionel

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Tuesday, June 26, 2007 12:42 PM
To: Kennedy, Lionel
Subject: RE: Book

Lionel:

A few more thoughts. Just so you know, I submitted the first five chapters of the book before the sixth because Paul told me (I can send you the email if you like) that DOJ preferred to get earlier chapters sooner so it could get started and do this in a timely fashion, and because I am certain that nothing in ch 6 comes close to the line. I sure hope that DOD is not now going to take another 6 weeks to review the book, and I hope you will do your best to expedite it over there. Haynes (DOD GC) is a friend of mine and I can call him directly if that is appropriate to ask for expedition. But I will not do so unless you say it is OK.

JG

Kennedy, Lionel

From: Kennedy, Lionel
Sent: Monday, July 9, 2007 4:47 PM
To: 'Jack Goldsmith'
Cc: Sessoms, GayLa
Subject: RE: Book -- Jack Goldsmith

Jack-- we heard from CIA over the holiday that they had no concern re classification. GayLa will check with the others when she is back tomorrow. We will get chapter 6 to DoD asap. Lionel

---

From: Jack Goldsmith [mailto (b)(6) Jack Goldsmith (personal)]
Sent: Monday, July 09, 2007 9:11 AM
To: Kennedy, Lionel
Subject: Book -- Jack Goldsmith

Hi Lionel. Jack Goldsmith here, from a different account. Attached is chapter 6. I took out that paragraph I sent you (on the published DOD memo), not because I thought it was a problem, but because it didn't fit (though please just go ahead and let DOD clear that paragraph as well). I do not believe there is anything in here that triggers a preclearance review duty, for I do not talk in this chapter about my time in government, but I send it along nonetheless as a matter of prudence. The one thing you might look at is the paragraph that describes the trheat matrix. I got this info from Tenet's book and Mueller's testimony.

On the other five chapters, can you please tell me the status of the review, and in particular what is happening at DOD and WH? As you know we are coming up on two weeks beyond the 30 business day period prescribed in the regulations. Thanks for any updates as soon as possible.

Jack

Colborn, Paul P

From:	Colborn, Paul P
Sent:	Tuesday, July 10, 2007 12:52 PM
To:	Kennedy, Lionel
Cc:	Sessoms, GayLa
Bcc:	Bradbury, Steve
Subject:	RE: Book -- Jack Goldsmith

Thanks. We did get the fax with CIA comments.

From: Kennedy, Lionel
Sent: Tuesday, July 10, 2007 11:53 AM
To: Colborn, Paul P
Cc: Sessoms, GayLa
Subject: RE: Book -- Jack Goldsmith

Yes, we will get that to you. And you should have gotten fax a few days ago with CIA comments on attorney-client issue.

From: Colborn, Paul P
Sent: Monday, July 09, 2007 5:36 PM
To: Kennedy, Lionel
Cc: Sessoms, GayLa
Subject: RE: Book -- Jack Goldsmith

Can you get chapter 6 to OLC also?

From: Kennedy, Lionel
Sent: Monday, July 09, 2007 4:47 PM
To: 'Jack Goldsmith'
Cc: Sessoms, GayLa

duplicate

Kennedy, Lionel

From: Kennedy, Lionel
Sent: Saturday, July 14, 2007 5:27 AM
To: '(b)(6) Jack Goldsmith (personal)'
Cc: Sessoms, GayLa
Subject: Re: update

Jack - we heard from the NSC that any comments it has would go through the OLC process. We have not heard from DoD and will keep trying there. (That is the roadblock now.) I think I already mentioned that CIA got back to us. Lionel

---

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

----- Original Message -----
From: Jack Goldsmith <(b)(6) Jack Goldsmith (personal)
To: Kennedy, Lionel
Cc: Sessoms, GayLa
Sent: Fri Jul 13 22:46:29 2007
Subject: Re: update

Lionel, Gayla: I had hoped you would get back with me today. I really must know the timeline for wrapping this thing up, please. I know it is not really in your hands, but any information you could send me would be appreciated. Thanks, Jack

On 7/11/07, Kennedy, Lionel <Lionel.Kennedy@usdoj.gov> wrote:

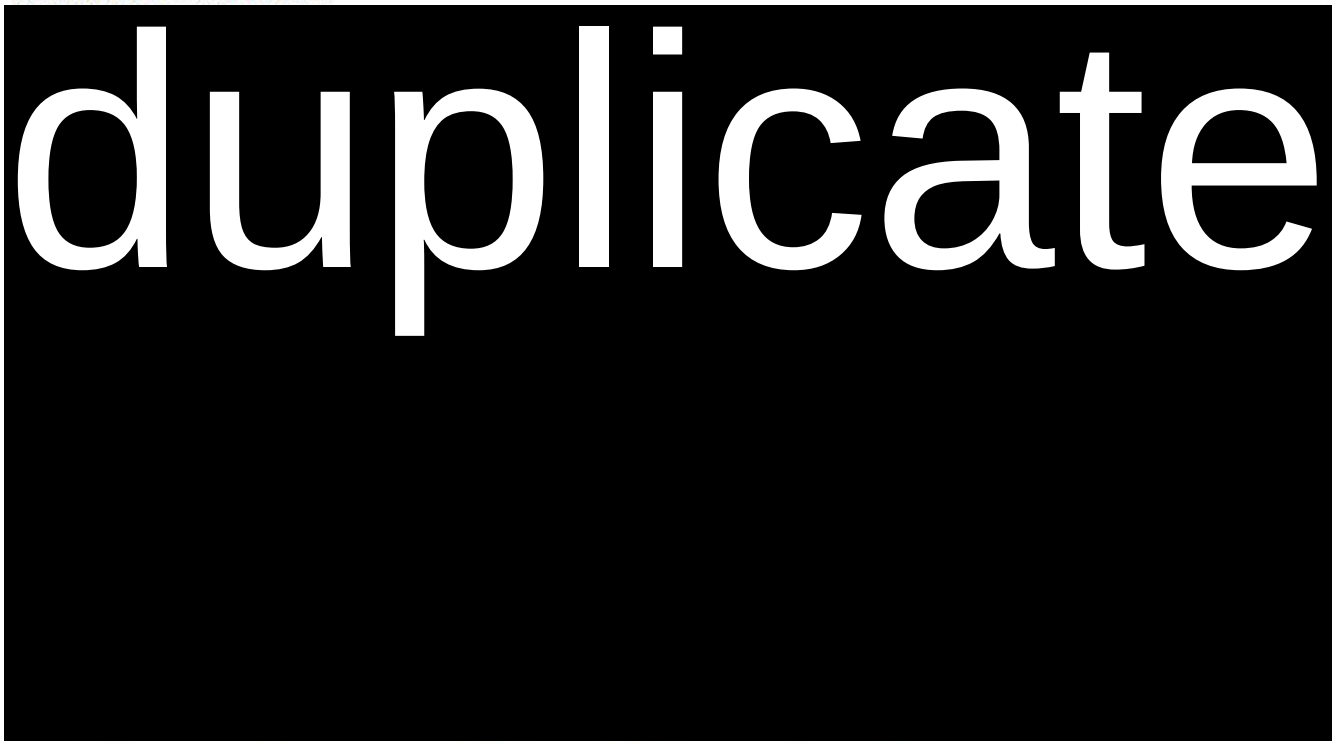
Jack-- DoD has told GayLa they hope to get back to us on chaps 1-5 at the end of this week. GayLa is still trying to close the loop with the White House.

In chapter 6-- there is a reference to adding "Iraq stuff." Will we see that? thx, Lionel

Colborn, Paul P

From: Colborn, Paul P
Sent: Saturday, July 14, 2007 8:57 AM
To: Bradbury, Steve
Subject: Fw: update

----- Original Message -----
From: Kennedy, Lionel
To: (b)(6) Jack Goldsmith (personal) <(b)(6) Jack Goldsmith (personal)
Cc: Sessoms, GayLa
Sent: Sat Jul 14 05:27:16 2007



Bradbury, Steve

From: Bradbury, Steve
Sent: Saturday, July 14, 2007 11:22 AM
To: Elwood, John; Colborn, Paul P
Subject: Re: Goldsmith Manuscript

Only chapter 6. Don't hold your breath.

----- Original Message -----
From: Elwood, John
To: Bradbury, Steve; Colborn, Paul P
Sent: Sat Jul 14 11:18:25 2007
Subject: Re: Goldsmith Manuscript

Did he send any (hpefully) revised chapters or only chapter 6?

----- Original Message -----
From: Bradbury, Steve
To: Colborn, Paul P
Cc: Elwood, John
Sent: Sat Jul 14 10:40:59 2007
Subject: Re: Goldsmith Manuscript

I agree. Thx!

----- Original Message -----
From: Colborn, Paul P
To: Bradbury, Steve
Cc: Elwood, John
Sent: Sat Jul 14 10:40:27 2007
Subject: Goldsmith Manuscript

I just read Jack's (concluding) chapter 6 and saw nothing for us to comment on.

Bradbury, Steve

From: Bradbury, Steve
Sent: Wednesday, July 25, 2007 2:22 PM
To: Colborn, Paul P
Subject: Fw: your comments

FYI. Should I respond?

----- Original Message -----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Bradbury, Steve
Sent: Wed Jul 25 14:16:26 2007
Subject: your comments

Steve:

I wanted to let you know that I took your comments on my manuscript very seriously and I accommodated some of them. Please pass this note along to Paul as well; for some reason I cannot find his email address. Thanks very much,

Jack

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, July 26, 2007 11:10 AM
To: Colborn, Paul P
Subject: RE: your comments

Okay. Thx

From: Colborn, Paul P
Sent: Thursday, July 26, 2007 11:10 AM
To: Bradbury, Steve
Subject: RE: your comments

Your draft language looks just right.

From: Bradbury, Steve
Sent: Thursday, July 26, 2007 10:56 AM
To: Colborn, Paul P
Subject: FW: your comments

FYI. Let's discuss. Thx

From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Wednesday, July 25, 2007 7:41 PM
To: Jack Goldsmith; Bradbury, Steve
Subject: RE: your comments

PS: Please confirm receipt when you have time. Thanks, Jack

From: Jack Goldsmith
Sent: Wed 7/25/2007 2:16 PM
To: Steve.Bradbury@usdoj.gov
Subject: your comments

Steve:

I wanted to let you know that I took your comments on my manuscript very seriously and I accommodated some of them. Please pass this note along to Paul as well; for some reason I cannot find his email address. Thanks very much,

Jack

Kennedy, Lionel

From: Kennedy, Lionel
Sent: Thursday, July 26, 2007 1:24 PM
To: Colborn, Paul P
Cc: Eisenberg, John
Subject: FW: update

Paul-- meant to include you on this. Lionel

From: Jack Goldsmith [mailto:(b)(6) Jack Goldsmith (personal)]
Sent: Thursday, July 26, 2007 8:19 AM
To: Kennedy, Lionel
Subject: Re: update

Thank You Lionel. Jack

On 7/26/07, **Kennedy, Lionel** <Lionel.Kennedy@usdoj.gov> wrote:

> Jack-- sorry not to have gotten back to you late yesterday with my phone number, which is (b) (6) . I'll let your message speak for itself. I understand your point of view with respect to the time. My view is that you've heard informally from me that I don't expect that DoJ (and the other agencies we've heard from) will have any classification issues with what has been submitted, not that you've received formal clearance from anyone.
>
> Fyi, I had again raised yesterday morning with our front office the DoD issue, and they are trying to address it. Thank you so much for keeping me informed, and let me know if there are any further developments at your end. Lionel
>
> ---
>
> **From:** Jack Goldsmith [mailto:(b)(6) Jack Goldsmith (personal)]
> **Sent:** Wednesday, July 25, 2007 7:51 PM
> **To:** Kennedy, Lionel
> **Subject:** update
>
> Lionel:
>
> I wanted to tell you this on the phone but I do not have your number so I will tell you via email: I sent my manuscript to my publisher. I have complied with my preclearance duties and have received clearance from all relevant agencies (CIA, DOJ, FBI, NSC, NSA) except DOD, which is now at least 4 weeks beyond the prescribed regulatory period for responding to the manuscript. I have waited patiently for an answer from DOD. You have (due to no fault of your own, I understand) been unable to tell me when if ever DOD will get back to me. I cannot simply sit around and wait indefinitely for an answer. I am confident that there is no classified information in the manuscript related to DOD, but if DOD thinks otherwise I will be able to consider and make changes for about a week or so. Many thanks for all of your assistance and kindness during this process.
>
> Please confirm receipt of this email.

Best,

Jack

Kennedy, Lionel

From:	Kennedy, Lionel
Sent:	Thursday, July 26, 2007 1:25 PM
To:	Colborn, Paul P
Cc:	Eisenberg, John
Subject:	FW: Jack Goldsmith book

fyi re "accuracy" issues.

From: Tiernan, Kevin
Sent: Thursday, July 26, 2007 11:33 AM
To: Olsen, Matthew; Kennedy, Lionel; Steele, Charles (NSD)
Subject: RE: Jack Goldsmith book

Art Horn of DOD just called. He said that the review is going well and they've received clearance from the Joint Staff and the General Counsel's office, having identified no classification issues. They are awaiting clearance from the policy office. He said that the General Counsel's office had some accuracy amendments to recommend and that we would receive those when the DOD review is completed. He thought that DOD review should be completed next week.

From: Olsen, Matthew
Sent: Thursday, July 26, 2007 8:50 AM
To: Kennedy, Lionel; Steele, Charles (NSD)
Cc: Tiernan, Kevin
Subject: RE: Jack Goldsmith book

Lionel --

Have all agencies -- except DoD - given formal clearance on this? Or does formal clearance only occur when every agency has signed off?

From: Kennedy, Lionel
Sent: Thursday, July 26, 2007 8:11 AM
To: Steele, Charles (NSD); Olsen, Matthew
Cc: Tiernan, Kevin
Subject: Jack Goldsmith book

fyi

From: Kennedy, Lionel
Sent: Thursday, July 26, 2007 8:10 AM
To: 'Jack Goldsmith'
Subject: RE: update

duplicate

Colborn, Paul P

From: Colborn, Paul P
Sent: Friday, July 27, 2007 8:42 AM
To: Bradbury, Steve
Subject: Fw: status

Fyi

----- Original Message -----
From: Kennedy, Lionel
To: 'Jack Goldsmith' <(b)(6) Jack Goldsmith (personal)
Cc: Tiernan, Kevin
Sent: Fri Jul 27 08:08:11 2007
Subject: status

Jack-- The informal word we got from DoD late yesterday is that some components have completed their reviews, and that the remaining one or ones should finish next week, possibly in the first half of the week. (However, we don't have a commitment from them). I don't believe that so far there are any classification issues. There may be some comments related to accuracy; the latter obviously will be yours to handle as you see fit. Lionel

Steele, Charles (NSD)

From: Steele, Charles (NSD)
Sent: Monday, August 6, 2007 5:47 PM
To: Kennedy, Lionel
Cc: Colborn, Paul P
Subject: RE: Letter re Goldsmith book

Go ahead and send it out. Thanks.

From: Kennedy, Lionel [mailto:Lionel.Kennedy@usdoj.gov]
Sent: Monday, August 06, 2007 3:37 PM
To: Steele, Charles (NSD)
Cc: Colborn, Paul P
Subject: Letter re Goldsmith book

<<letter to Jack Goldsmith prepub review 6 aug 2007.wpd>>

Charlie-- per our discussion, attached is revised letter. Regs say that the AAG or a designee will respond to review requests, so you can sign as long as you are Ken's designee.

Paul-- fyi, we expect to sign this out today. Thx, Lionel

Colborn, Paul P

From: Colborn, Paul P
Sent: Monday, August 6, 2007 5:52 PM
To: Bradbury, Steve
Subject: Fw: Letter re Goldsmith book
Attachments: letter to Jack Goldsmith prepub review 6 aug 2007.wpd

Fyi

----- Original Message -----
From: Kennedy, Lionel
To: Steele, Charles (NSD)
Cc: Colborn, Paul P
Sent: Mon Aug 06 15:36:32 2007

duplicate

U.S. Department of Justice

National Security Division

Washington, D.C. 20530

August 6, 2007

Professor Jack Goldsmith
Harvard University Law School
Cambridge, MA 02138

Dear Professor Goldsmith:

This office has completed its prepublication review of the six chapters and a postscript from your manuscript entitled *The Terror Presidency: Law and Judgment Inside the Bush Administration.* Our review was conducted solely to identify and prevent the disclosure of Sensitive Compartmented Information (SCI) and other classified information to which you may have had prior authorized access. After careful review of the material you submitted, we have determined that these chapters of your manuscript do not contain any classified information. This determination is limited to the exact information submitted; and any changes, other than typographical or grammatical, require a new review prior to publication.

As noted above, our review was limited to classification issues. We did not review the manuscript for any otherwise nonpublic information or any information that may be protected by the attorney-client privilege. We would refer any questions about those issues as they pertain to your manuscript to the Office of Legal Counsel.

Thank you for your patience during the prepublication review process.

Sincerely,

Charles M. Steele
Chief of Staff

Bradbury, Steve

From:	Bradbury, Steve
Sent:	Tuesday, August 7, 2007 1:11 PM
To:	Colborn, Paul P
Cc:	Eisenberg, John; Elwood, John
Subject:	FW: Post Employment Issues Full Distribution (August 2005)
Attachments:	Post Employment Issues Full Distribution (August 2005).wpd

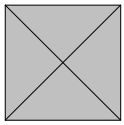
<<Post Employment Issues Full Distribution (August 2005).wpd>> Paul: In response to Jack's email of today, in which he states again that he believes he is under no obligation to remove nonpublic client confidences from his book manuscript, I intend to send him a copy of the PRAO memo, attached, and direct his attention to pages 8-12. I also intend to cite the relevant bar rules and include the Scalia quotation we discussed before. Steve

-----Original Message-----
From: Colborn, Paul P
Sent: Thursday, May 24, 2007 5:15 PM
To: Bradbury, Steve; Eisenberg, John; Elwood, John
Subject: FW: Post Employment Issues Full Distribution (August 2005)

FYI, in re Goldsmith manuscript.

-----Original Message-----
From: Kingsley, Michael (PRAO)
Sent: Thursday, May 24, 2007 5:06 PM
To: Colborn, Paul P
Cc: Kammerman, Barbara (PRAO); Spells, Jean (PRAO)
Subject: Post Employment Issues Full Distribution (August 2005)

Per Bobby Kammerman's request, please find attached PRAO's memoranda on "Post Employment Issues for Department Attorneys and Assistant United States Attorneys to Consider Upon Leaving the Department for Other Employment."



U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C.

August 2005

MEMORANDUM

TO: Department of Justice Attorneys

FROM: Professional Responsibility Advisory Office

RE: Professional Responsibility Issues for Department Attorneys and Assistant United States Attorneys to Consider Upon Leaving the Department for Other Employment

Introduction

There are a number of professional responsibility issues that Department attorneys and Assistant United States Attorneys should consider when they leave the Department to pursue other employment. We have identified and analyzed these issues below, and we are available to provide case-specific assistance to Department attorneys on these matters while they are employed by the Department. This memorandum is prepared with the expectation that a Department attorney or AUSA may take it with him/her upon leaving the Department.

Who Is the Department Attorney's Client?

Generally, the Department attorney's client is the United States. See The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47 (1982) (where DOJ lawyer represents federal agencies, the lawyer represents the interests of the United States as a whole). More specifically, the Department attorney's client is the Executive Branch of the government, inasmuch as Department attorneys represent the position of the current Administration and articulate its position when litigating, negotiating and carrying out their official duties. Identifying the client is an important consideration under the professional conduct rules because certain professional responsibility obligations – such as the duties of confidentiality and loyalty – are owed only to the client. As discussed further below, only the client may consent to the disclosure of confidential information and to a lawyer's representation despite a conflict of interest.

The Duty of Loyalty

Former Department attorneys owe the United States an ongoing duty of loyalty, which prohibits them from representing interests adverse to the United States in matters related to those on which they worked while a Department attorney. Courts have been particularly cautious in situations involving "side switching" government attorneys. Recently, the United States District Court for the District of Columbia emphasized that, in examining cases involving former government attorneys accused of "side switching," the

court "must be especially careful" for two reasons:

> First, because government attorneys may have had access to more kinds of information in connection with the prior representations than private attorneys typically do, there is a greater potential for misuse of information – including information that is not necessarily confidential in nature – . . . in the revolving door context. Second, the public is generally more concerned about government improprieties than about private improprieties. Thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.

United States v. Philip Morris, Inc., 312 F. Supp. 2d 27, 38 (D.D.C. 2004) (citing Brown v. D.C. Bd. of Zoning Adjustment, 486 A.2d 37, 43 (D.C. 1984) (en banc)); see also Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) ("The purpose most often ascribed to the limitation on former government attorneys is to avoid 'the manifest possibility that (a former government lawyer's) action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.'") (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 37 (1931)).

The applicable rule is Model Rule of Professional Conduct 1.11(a)(2004)[1] which provides:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
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> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and

[1] Because most jurisdictions have adopted some form of the ABA Model Rules of Professional Conduct, this memorandum will focus on those rules to set forth generally Department attorneys' ethical responsibilities arising out of their work with the Department. When analyzing a specific ethical issue, attorneys should review the rules of the applicable jurisdiction, which may involve a choice of law analysis to determine which jurisdiction's rules apply.

> substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Although Model Rule 1.11 prohibits a lawyer from representing a client in certain circumstances, some jurisdictions' versions of the rule prohibit any employment whether or not deemed to be legal representation. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2001). Moreover, even in jurisdictions where the rule forbids only representation, simply because an attorney is identified as a consultant does not resolve the issue of whether the attorney is representing a client. See, e.g. Comm. for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177, 1192 (D.C. 1982) (determining that a former city attorney would be deemed to have violated the precursor to D.C.'s Rule 1.11—which bans "accepting employment" related to cases handled while in government practice rather than "representation" related to such cases—when he participated in behind-the-scenes counseling that assisted his firm's representation of a client in an administrative hearing but for the fact that the matter involved in the hearing was not the same as the matter he handled while in government practice); Pennsylvania Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility Op. 94-132 (1994) (former Department attorney was not permitted to act as "legal consultant" for opposing party on a case where she formerly represented the government); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004) (concerning the scope of representation of a client and expressly prohibiting a lawyer from counseling or assisting a client in illegal conduct–thus implying that counseling is part of representation of a client).[2] In this regard, you also should consider that professional responsibility issues may arise if you continue to advise the Department after your departure about matters you handled while at the Department. See, e.g. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004)(addressing concurrent conflicts of interest).

Another issue to consider is whether an attorney's work for the Department constituted work on a "matter." Model Rule 1.11(e) defines "matter" as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and . . . any other matter covered by the conflict of interest rules of the appropriate government agency." Id. R.1.11(e). Generally, participating in litigation in any capacity would constitute participation in a matter, while doing regulatory work ordinarily would not be deemed work on a matter. See, e.g., Philip Morris, Inc., 312 F. Supp. 2d at 39-40 (court generally recognized that work on a rulemaking would not constitute

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[2] As discussed further below, even if an attorney is not deemed to be representing a client, work as a consultant still would be limited by the attorney's duty to maintain client confidences under Model Rules 1.6 and 1.9(c).

participation in a matter, but found that an attorney who spent many hours working on a rulemaking that was the subject of a prior litigation was deemed to have participated in a matter under District of Columbia Rule 1.11(a), even though the attorney never entered an appearance in the case); see also In re Sofaer, 728 A.2d 625, 627 (D.C. 1999) ("The contours of the [Pan Am 103] bombing, the government's investigation, and related responses to it were defined sharply enough to constitute a 'matter' under the Rule."). Thus, each situation will have to be evaluated on a case-by-case basis. Ordinarily, conducting investigations and litigating a case would constitute participation in a matter under the relevant rules. On the other hand, providing general training would not constitute participation in a "matter."

The other component of the rule requires that an attorney have participated "personally and substantially" in the matter. Although the term "substantially" might suggest that a former government attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case"); Sofaer, 728 A.2d at 627 (court found that attorney participated personally and substantially in Pan Am 103 matter when he reviewed and approved a memorandum recommending a response to a subpoena, gave advice on whether or how fully to inform the designated witness in the subpoena matter about a particular meeting, and participated in meetings that included information about the progress of the criminal investigation and related diplomatic actions).

In evaluating whether an attorney's participation in a matter was personal and substantial, courts also consider whether the former government attorney has confidential information that could be used to the detriment of the former government client. See Dugar v. Bd. of Educ., No. 92 C 1621, 1992 WL 142302, at *4-6 (N.D. Ill. June 18, 1992) (court found that a former Board of Education attorney should be disqualified even though the matter prompting the disqualification motion had not even arisen at the time she was employed with the Board because she was privy to discussions regarding the Board's position on matters potentially related to the litigation at issue); see also Sofaer, 728 A.2d at 627-28 ("Rule 1.11(a) bars participation in overlapping government and private matters

where it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second; the actual receipt of . . . information, and hence disclosure of it, is immaterial.") (citations omitted) (emphasis added).[3]

Any analysis concerning whether an attorney participated personally and substantially in a matter under the relevant professional responsibility rules will have to be made on a case-by-case basis. Under Model Rule 1.11(a), if there is a conflict of interest based on the prior government representation, the United States may consent to the former Department attorney's participation. On the other hand, some jurisdictions' post-employment rules do not provide that the government may consent to the conflict, thereby indicating that participation in the matter is barred completely if there is a conflict of interest. See, e.g., N.Y. STATE BAR ASSOC., THE LAWYERS CODE OF PROF'L RESPONSIBILITY, DR 9-101(B) (2002); D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2001).

If a former Department attorney were to join a firm and had a conflict of interest in a particular matter, the rules also would prohibit the attorney's firm from participating in such a matter unless the former Department attorney is screened and is apportioned no fee from the matter, and unless the firm notifies the government of the screening measures. See MODEL RULES OF PROF'L CONDUCT R. 1.11(b) (2004). The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed – months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed*.") (emphasis added);

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[3] In evaluating this issue, an attorney also should consider 18 U.S.C. § 207(a)(1), which bars, inter alia, an individual from representing any other person before a Federal department, agency, or court in connection with particular matters involving specific parties in which that individual participated "personally and substantially" while serving in his government position. See United States v. Trafficante, 328 F.2d 117 (5th Cir. 1961) (former Internal Revenue Service attorney who handled income tax claims against defendants was disqualified under both Section 207 and the rules of professional conduct from representing defendants in subsequent suits regarding balance due on those income taxes); United States v. Martin, 39 F. Supp. 2d 1333, 1334-35 (D. Utah 1999) (court disqualified former AUSA and concluded that his consultation on the issuance of subpoenas and other supervisory actions, "taken as a whole, creates the 'reasonable appearance' of significance" that amounted to personal and substantial participation under section 207).

Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).

This rule also imposes specific prohibitions on a former government attorney's use of confidential information. Model Rule of Professional Conduct 1.11(c) (2004) provides:

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

This rule prohibits former Department attorneys from representing a client in a private matter that would be adverse to a person about whom they have confidential government information as a result of their employment with the Department. Based on the proscriptions in this rule, and those discussed below regarding Model Rule 1.9(c), former Department attorneys likely would be precluded from participating in any matters in which confidential government information they learned while a Department attorney would be relevant to the private matter.

In addition, Model Rule of Professional Conduct 1.11(d)(2)(ii) (2004) also places restrictions on a Department attorney's ability to negotiate for private employment. This rule states in relevant part:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which

the lawyer is participating personally and substantially. . . .

Accordingly, to the extent a Department attorney works on the substance of a particular matter, he or she would be prohibited from negotiating for employment with anyone who is involved in that same matter.[4]

Who May Consent to an Attorney's Representation Notwithstanding a Conflict of Interest

The individual who may provide consent to a former Department attorney's work on a case notwithstanding a conflict of interest will vary and depend on a number of factors. In many instances, the United States Attorney for the former AUSA's Office or the Assistant Attorney General for the component in which the former Department attorney worked will be the individual who may provide the requisite consent, but depending on the nature of the conflict, someone at a higher level may need to provide consent.

The Duty to Maintain Client Confidences

Confidentiality is one of the core duties an attorney owes his client. See In re Am. Airlines, 972 F.2d 605, 619 (5th Cir. 1992) ("[A] lawyer's obligation of confidentiality must be seen as part of the lawyer's primary duty of loyalty . . . ."); Greig v. Macy's Northeast, Inc., 1 F. Supp. 2d 397, 400 (D.N.J. 1998) (The duty of confidentiality is "basic to the

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[4] Department attorneys also should bear in mind that the Standards of Conduct impose additional restrictions on their ability to negotiate for other employment. See 5 C.F.R. § 2635.604. This provision requires that any employee who is "seeking employment" with a particular employer must disqualify him/herself from participating in any matter involving the prospective employer.

The definition of "seeking employment" is broader than what might otherwise be the common-sense definition of the phrase. "Seeking employment" is defined in the Standards of Conduct to include situations in which an employee is engaged in negotiations with any person with a view toward reaching agreement regarding possible employment. However, it also includes an *unsolicited* communication with a person *or* an intermediary regarding possible employment with that person, if that communication solicits any response other than a rejection. Id.

For further guidance on this issue, current and former Assistant United States Attorneys should consult with the Office of General Counsel in the Executive Office for United States Attorneys; current and former Main Justice attorneys should consult with the Departmental Ethics Office in the Justice Management Division.

legitimate practice of law.").

This duty is codified in ABA Model Rule of Professional Conduct 1.6(a), which provides, in relevant part, that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . [or] the disclosure is impliedly authorized in order to carry out the representation. . . ." MODEL RULES OF PROF'L CONDUCT R.1.6(a) (2004); see also id. R. 1.8(b) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."). "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Id. R.1.6, cmt. 3 (emphasis added); see Stepak v. Addison, 20 F.3d 398, 406 (11th Cir. 1994). Other precedent provides that information obtained in the course of an attorney-client relationship is required to be "sheltered from use," regardless of who else may know of it, because of the duty of loyalty inherent in that relationship. See Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 172 (5th Cir. 1979) (rejecting the idea that an attorney is relieved from his duty to protect confidential information because both parties are privy to it as a result of prior joint representation.). The phrase "information relating to the representation" has been interpreted to include a broad spectrum of information, including information that may not itself be protected but reasonably could lead to the discovery of such information by third persons. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 4 (2004); ABA Comm. on Ethics and Prof'l Responsibility, Formal Ethics Op. 98-411 (1998) (noting that, in lawyer-to-lawyer consultations, use of hypotheticals that enable another lawyer to determine identity of one's client may, under some circumstances, violate Rule 1.6); United States v. Stepney, 246 F. Supp. 2d 1069, 1073 (N.D. Cal. 2003) ("The ethical rules governing attorneys require that all information pertaining to a client's case be kept confidential.").

The prohibition on the disclosure of client confidences applies in any context, including statements made when employed as a television commentator or consultant, statements made at a Congressional hearing (even when appearing pursuant to a subpoena), comments made to the media, oral presentations and publications such as a book or an article.[5] Whether a former Department attorney properly may make certain statements or act

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[5] Department attorneys also should bear in mind that, prior to terminating employment with the Department, they are prohibited from making or negotiating "an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." See MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2004). Courts routinely have criticized lawyers who make arrangements to benefit from the publication of their client's stories. See, e.g., United States v. Hearst, 638 F.2d 1190, 1197-98 (1st Cir. 1980) (lawyer admonished for contracting to

as a legal commentator in a particular situation likely would depend on the specific facts on which the attorney would be commenting. It may be difficult to divorce what an attorney learned as a client confidence from the publicly available information, such that an attorney's comments would be free from the effect of the client confidences. As one district court has opined in this regard:

> Advice and information about how to conduct lemon law litigation against various manufacturers, including GM, along with form pleadings and interrogatories, proliferate in legal periodicals, practice manuals, law review articles, textbooks, and through bar association conferences and publications. However, this is true of just about every type of matter there is to litigate. The information age has not neglected the legal profession, and step-by-step checklists on litigating a particular type of case can be found in every law library and computerized legal database in the country. The fact that this type of information is publicly available does not make "information relating to the representation" of GM "generally known." Rule 1.9(a)(2) also contemplates knowledge of the decision-making processes of GM personnel regarding legal claims, the internal workings of the GM organization, the particular personalities, expectations, negotiating techniques, and management styles of GM personnel, historical and technical information regarding GM vehicles, and GM claims handling processes and procedures. This type of information is protected by the attorney-client relationship whether the matter involves a complicated legal issue, such as in antitrust law, or whether it involved the "*pro forma*" litigation of lemon law claims. It would be available to someone whose extensive experience as a local counsel for GM legal and technical personnel and who was trusted enough for his firm to be one of only a few granted blanket settlement authority by GM, but it is not generally known.

Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D.N.J. 1995).

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write a book about his client's case while the representation was ongoing); The Florida Bar v. Niles, 644 So. 2d 504, 507 (Fla. 1994) (lawyer was suspended for, inter alia, having his client interviewed for a television program without her consent).

Does the Duty to Maintain Client Confidences Change Once an Attorney Leaves the Department?

The duty of confidentiality continues after the attorney-client relationship has terminated. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 18 (2004); Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (the attorney-client privilege survives the client's death). Consequently, even after attorneys leave the Department, they may not reveal the United States' confidences absent the United States' consent. Likewise, former Department attorneys may not use confidential information to the United States' detriment unless the United States consents or the information is "generally known." See MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2004) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to the client, or when the information has become generally known . . . ."); id. R. 1.9(c)(2)("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

The term "generally known" is not clearly defined in the professional responsibility rules or the legal jurisprudence. Some courts and legal treatises have concluded that information does not become "generally known" simply because it is made public. Rather, the manner of its disclosure and subsequent accessibility are the determinative factors:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-date storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known . . . . A lawyer may not justify adverse use or disclosure of client information simply because the information

> has become known to third persons, if it is not otherwise generally known.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59, cmt. d (2000); see NCK Org. v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976) ("The client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.'") (quoting Emle Indus., Inc. v. Patentex, 478 F.2d 562, 572-73 (2d Cir. 1973) (quoting H. Drinker, Legal Ethics 135 (1953))); Tiuman v. Canant, No. 92 Civ. 5813 (JFK), 1994 U.S. Dist. Lexis 6626, at *10 (S.D.N.Y. May 19, 1994) (even if lawyer had privileged information already known to his current clients, the former client's "privilege in this information as disclosed to his attorney . . . is not thereby nullified"); Steel, 912 F. Supp. at 739 (that information is publicly available does not necessarily mean that information relating to the representation is "generally known"); Buckley v. Airshield Co., 908 F. Supp. 299, 306 (D. Md. 1995) (client's privilege in confidential information is not lost when the information is part of the public record); Cohen v. Wolgin, CIV. A. No. 97-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993). Other courts subscribe to the view that information is "generally known" when it is a matter of public record. See Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 9 F. Supp. 2d 572, 580 (W.D.N.C. 1998) (without further discussion, opining that matters of public record are not considered to be confidential); Jones & Henry Eng'rs, Ltd. v. Town of Orland, 942 F. Supp. 1202, 1208 (N.D. Ind. 1996) (same); Unisys Corp. v. Amperif Corp., Civ. A. No. 92-1966, 1992 WL 210243, at *4 (E.D. Pa. Aug. 20, 1992) ("[a]ny information appearing on documents open to public inspection has passed into the public domain and become general knowledge").

At bottom, the duty to maintain client confidences does not change in any significant respect after the Department attorney leaves the Department. In many instances, former Department attorneys will be prohibited from disclosing the United States' confidences, unless the United States consents. The individual who could consent to the disclosure of client confidences would be the same individual who could consent to representation by a lawyer notwithstanding a conflict of interest.

Conclusion

The rules on client confidences and conflicts of interest may impose substantial restrictions on a Department attorney's post-employment activities.[6] PRAO is available to

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[6] This memorandum is not intended to include a discussion of every statute or professional conduct rule that may be implicated upon your departure from the Department.

provide specific advice on the issues discussed in this memorandum to individual Department attorneys before they leave the Department.

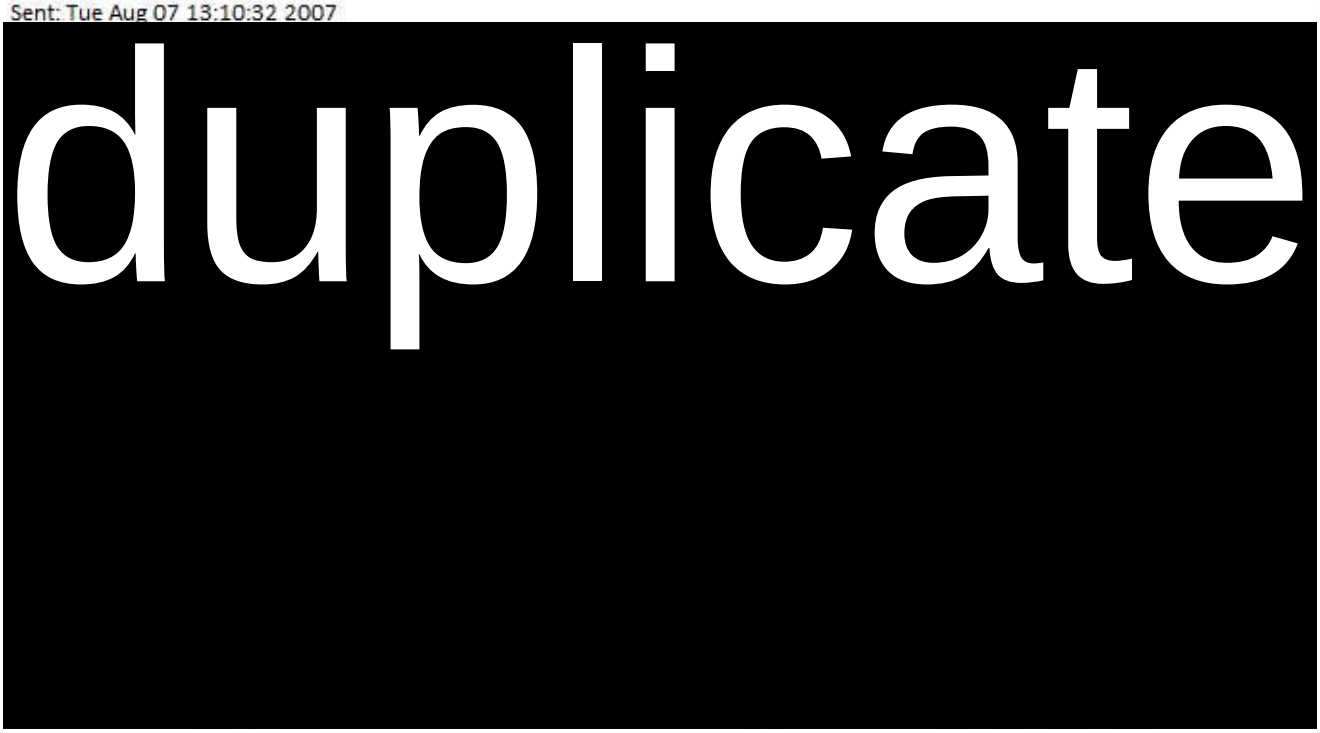
There may be other statutes or rules that you should consider. See, e.g. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004) (generally prohibits an attorney from making an extrajudicial statement that has a substantial likelihood of materially prejudicing an adjudicative proceeding in which the attorney is participating or has participated).

Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, August 7, 2007 3:46 PM
To: Bradbury, Steve
Cc: Eisenberg, John; Elwood, John
Subject: Re: Post Employment Issues Full Distribution (August 2005)

Good

----- Original Message -----
From: Bradbury, Steve
To: Colborn, Paul P
Cc: Eisenberg, John; Elwood, John
Sent: Tue Aug 07 13:10:32 2007



Bradbury, Steve

From:	Bradbury, Steve
Sent:	Tuesday, August 7, 2007 4:50 PM
To:	'Jack Goldsmith'
Cc:	Colborn, Paul P
Subject:	RE: your comments
Attachments:	Post Employment Issues Full Distribution (August 2005).wpd

Jack:

Thank you for your careful consideration.

The primary thrust of our comments goes to the continuing duty of former government attorneys to protect from disclosure client confidences of the United States, as explained in pages 8 through 12 of the attached memorandum issued by the Department's Professional Responsibility Advisory Office, which is provided to Department attorneys when they leave the Department. See Memorandum to Department of Justice Attorneys from Professional Responsibility Advisory Office, Re: Professional Responsibility Issues for Department Attorneys and Assistant United States Attorneys to Consider Upon Leaving the Department for Other Employment, at 8-12 (August 2005) (attached hereto). As the attached PRAO memorandum states, "[c]onfidentiality is one of the core duties an attorney owes his client." Id. at 8. The duty to maintain client confidences recognized under the Model Rules of Professional Conduct "contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." ABA Model Rules of Prof'l Conduct R.1.6, cmt. 3(2004). This essential duty to maintain client confidences means that "even after attorneys leave the Department, they may not reveal the United States' confidences absent the United States' consent." PRAO Memorandum at 10. A prominent example of adherence to this duty is found in the testimony of former head of OLC Antonin Scalia during his 1986 Senate confirmation hearing for the Supreme Court. When asked to reveal advice he had provided to President Ford more than 10 years before, he declined, citing "the attorney-client relationship" and stating that he "should not disclose [the advice] unless the President wants me to." Nomination of Judge Antonin Scalia: Hearings Before S. Comm. on the Judiciary, 99th Cong. 163-64 (1987).

We remain greatly concerned about the potential impact on the future relationship between OLC and the White House, particularly Counsel's Office, if the client confidences of the WH are published. As with any attorney-client relationship, the relationship between the Counsel's Office and OLC depends on trust and confidentiality. If the Counsel's Office becomes concerned that OLC attorneys may publish books or articles that reveal confidential communications between the two offices, there will be an inevitable and significant weakening of that trust and expectation of confidentiality, resulting in a chilling effect on the candid flow of information, advice and discussion between the offices. I'm sure you would agree that causing the Counsel's Office to be reluctant to seek advice from OLC, or to be inhibited in its communications with OLC, would only disserve the President, for whom the full and effective advice and assistance from legal counsel is essential to the discharge of his constitutional responsibilities. See Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. 2, 3 (1996) (Opinion for President Clinton from Attorney General Reno) ("I agree that the ability of the White House Counsel's Office to serve the President would be significantly impaired if the confidentiality of its communications . . . is not protected . . . . Impairing the ability of the Counsel's Office to perform its important functions for the President would in turn impair the ability of you and future Presidents to carry out your constitutional responsibilities."). See generally Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481 (1982).

Jack, I hope these additional thoughts are helpful to you, and I would continue to urge you to give the most careful consideration to our concerns. Thank you! Steve

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From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Tuesday, August 07, 2007 12:15 PM
To: Bradbury, Steve
Cc: Colborn, Paul P
Subject: RE: your comments

Steve (and Paul):

Thank you for this message, and my apologies for delay. As you will recall, I did not submit the manuscript to OLC for review; I only submitted it for pre-clearance classified information review, as required by regulation, to OIPR. When OLC nonetheless got a copy and offered its views about passages it thought should be deleted, I told you I would consider OLC's views, and I later assured you that I considered these suggestions very seriously, and that I modified and deleted some passages. I believe this far exceeds my pre-publication obligations, and I hope you agree.

Best wishes,

Jack

From: Bradbury, Steve [mailto:Steve.Bradbury@usdoj.gov]
Sent: Thursday, July 26, 2007 11:11 AM
To: Jack Goldsmith
Cc: Colborn, Paul P
Subject: RE: your comments

Sorry for not responding yesterday, Jack. When you say that you've accommodated some but not all of our comments, would you be able to let us know the significant passages we highlighted where you're not proposing to accommodate our concerns? Many thanks! Steve

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From: Jack Goldsmith [mailto:jgoldsmith@law.harvard.edu]
Sent: Wednesday, July 25, 2007 7:41 PM
To: Jack Goldsmith; Bradbury, Steve
Subject: RE: your comments

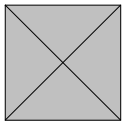
PS: Please confirm receipt when you have time. Thanks, Jack

From: Jack Goldsmith
Sent: Wed 7/25/2007 2:16 PM
To: Steve.Bradbury@usdoj.gov
Subject: your comments

Steve:

I wanted to let you know that I took your comments on my manuscript very seriously and I accommodated some of them. Please pass this note along to Paul as well; for some reason I cannot find his email address. Thanks very much,

Jack



U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C.

August 2005

MEMORANDUM

TO: Department of Justice Attorneys

FROM: Professional Responsibility Advisory Office

RE: Professional Responsibility Issues for Department Attorneys and Assistant United States Attorneys to Consider Upon Leaving the Department for Other Employment

Introduction

There are a number of professional responsibility issues that Department attorneys and Assistant United States Attorneys should consider when they leave the Department to pursue other employment. We have identified and analyzed these issues below, and we are available to provide case-specific assistance to Department attorneys on these matters while they are employed by the Department. This memorandum is prepared with the expectation that a Department attorney or AUSA may take it with him/her upon leaving the Department.

Who Is the Department Attorney's Client?

Generally, the Department attorney's client is the United States. See The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47 (1982) (where DOJ lawyer represents federal agencies, the lawyer represents the interests of the United States as a whole). More specifically, the Department attorney's client is the Executive Branch of the government, inasmuch as Department attorneys represent the position of the current Administration and articulate its position when litigating, negotiating and carrying out their official duties. Identifying the client is an important consideration under the professional conduct rules because certain professional responsibility obligations – such as the duties of confidentiality and loyalty – are owed only to the client. As discussed further below, only the client may consent to the disclosure of confidential information and to a lawyer's representation despite a conflict of interest.

The Duty of Loyalty

Former Department attorneys owe the United States an ongoing duty of loyalty, which prohibits them from representing interests adverse to the United States in matters related to those on which they worked while a Department attorney. Courts have been particularly cautious in situations involving "side switching" government attorneys. Recently, the United States District Court for the District of Columbia emphasized that, in examining cases involving former government attorneys accused of "side switching," the

court "must be especially careful" for two reasons:

> First, because government attorneys may have had access to more kinds of information in connection with the prior representations than private attorneys typically do, there is a greater potential for misuse of information – including information that is not necessarily confidential in nature – . . . in the revolving door context. Second, the public is generally more concerned about government improprieties than about private improprieties. Thus, the appearance problem is more severe because the public is likely to be more critical of the potential misuse of information.

United States v. Philip Morris, Inc., 312 F. Supp. 2d 27, 38 (D.D.C. 2004) (citing Brown v. D.C. Bd. of Zoning Adjustment, 486 A.2d 37, 43 (D.C. 1984) (en banc)); see also Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) ("The purpose most often ascribed to the limitation on former government attorneys is to avoid 'the manifest possibility that (a former government lawyer's) action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.'") (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 37 (1931)).

The applicable rule is Model Rule of Professional Conduct 1.11(a)(2004)[1] which provides:

> Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and

[1] Because most jurisdictions have adopted some form of the ABA Model Rules of Professional Conduct, this memorandum will focus on those rules to set forth generally Department attorneys' ethical responsibilities arising out of their work with the Department. When analyzing a specific ethical issue, attorneys should review the rules of the applicable jurisdiction, which may involve a choice of law analysis to determine which jurisdiction's rules apply.

> substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Although Model Rule 1.11 prohibits a lawyer from representing a client in certain circumstances, some jurisdictions' versions of the rule prohibit any employment whether or not deemed to be legal representation. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2001). Moreover, even in jurisdictions where the rule forbids only representation, simply because an attorney is identified as a consultant does not resolve the issue of whether the attorney is representing a client. See, e.g. Comm. for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177, 1192 (D.C. 1982) (determining that a former city attorney would be deemed to have violated the precursor to D.C.'s Rule 1.11—which bans "accepting employment" related to cases handled while in government practice rather than "representation" related to such cases—when he participated in behind-the-scenes counseling that assisted his firm's representation of a client in an administrative hearing but for the fact that the matter involved in the hearing was not the same as the matter he handled while in government practice); Pennsylvania Bar Assoc. Comm. on Legal Ethics and Prof'l Responsibility Op. 94-132 (1994) (former Department attorney was not permitted to act as "legal consultant" for opposing party on a case where she formerly represented the government); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004) (concerning the scope of representation of a client and expressly prohibiting a lawyer from counseling or assisting a client in illegal conduct–thus implying that counseling is part of representation of a client).[2] In this regard, you also should consider that professional responsibility issues may arise if you continue to advise the Department after your departure about matters you handled while at the Department. See, e.g. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004)(addressing concurrent conflicts of interest).

Another issue to consider is whether an attorney's work for the Department constituted work on a "matter." Model Rule 1.11(e) defines "matter" as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and . . . any other matter covered by the conflict of interest rules of the appropriate government agency." Id. R.1.11(e). Generally, participating in litigation in any capacity would constitute participation in a matter, while doing regulatory work ordinarily would not be deemed work on a matter. See, e.g., Philip Morris, Inc., 312 F. Supp. 2d at 39-40 (court generally recognized that work on a rulemaking would not constitute

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[2] As discussed further below, even if an attorney is not deemed to be representing a client, work as a consultant still would be limited by the attorney's duty to maintain client confidences under Model Rules 1.6 and 1.9(c).

participation in a matter, but found that an attorney who spent many hours working on a rulemaking that was the subject of a prior litigation was deemed to have participated in a matter under District of Columbia Rule 1.11(a), even though the attorney never entered an appearance in the case); see also In re Sofaer, 728 A.2d 625, 627 (D.C. 1999) ("The contours of the [Pan Am 103] bombing, the government's investigation, and related responses to it were defined sharply enough to constitute a 'matter' under the Rule."). Thus, each situation will have to be evaluated on a case-by-case basis. Ordinarily, conducting investigations and litigating a case would constitute participation in a matter under the relevant rules. On the other hand, providing general training would not constitute participation in a "matter."

The other component of the rule requires that an attorney have participated "personally and substantially" in the matter. Although the term "substantially" might suggest that a former government attorney's participation in a prior matter must be extensive to justify disqualification, the case law demonstrates otherwise. The "substantial" participation requirement means participation in the substance of the prior matter and does not require some particular quantum of effort expended. The rule requires some involvement but does not require that the attorney was directly responsible for the prior matter in question. See United States v. Smith, 995 F.2d 662, 675-76 (7th Cir. 1993) (court found that an AUSA's involvement was "personal" and "substantial" under Illinois Rule of Professional Conduct 1.11(a) (similar to the Model Rule 1.11) when he supervised another AUSA in charge of investigating a related case, attended high level meetings about the case, and signed an immunity agreement for one of the government's witnesses); Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358, 1367 (C.D. Cal. 1984) (district court found that, when the SEC Regional Administrator signed a complaint and trial brief, he assumed the "personal and substantial responsibility of ensuring that there existed good grounds to support the SEC's case"); Sofaer, 728 A.2d at 627 (court found that attorney participated personally and substantially in Pan Am 103 matter when he reviewed and approved a memorandum recommending a response to a subpoena, gave advice on whether or how fully to inform the designated witness in the subpoena matter about a particular meeting, and participated in meetings that included information about the progress of the criminal investigation and related diplomatic actions).

In evaluating whether an attorney's participation in a matter was personal and substantial, courts also consider whether the former government attorney has confidential information that could be used to the detriment of the former government client. See Dugar v. Bd. of Educ., No. 92 C 1621, 1992 WL 142302, at *4-6 (N.D. Ill. June 18, 1992) (court found that a former Board of Education attorney should be disqualified even though the matter prompting the disqualification motion had not even arisen at the time she was employed with the Board because she was privy to discussions regarding the Board's position on matters potentially related to the litigation at issue); see also Sofaer, 728 A.2d at 627-28 ("Rule 1.11(a) bars participation in overlapping government and private matters

where it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second; the actual receipt of . . . information, and hence disclosure of it, is immaterial.") (citations omitted) (emphasis added).[3]

Any analysis concerning whether an attorney participated personally and substantially in a matter under the relevant professional responsibility rules will have to be made on a case-by-case basis. Under Model Rule 1.11(a), if there is a conflict of interest based on the prior government representation, the United States may consent to the former Department attorney's participation. On the other hand, some jurisdictions' post-employment rules do not provide that the government may consent to the conflict, thereby indicating that participation in the matter is barred completely if there is a conflict of interest. See, e.g., N.Y. STATE BAR ASSOC., THE LAWYERS CODE OF PROF'L RESPONSIBILITY, DR 9-101(B) (2002); D.C. RULES OF PROF'L CONDUCT R. 1.11(a) (2001).

If a former Department attorney were to join a firm and had a conflict of interest in a particular matter, the rules also would prohibit the attorney's firm from participating in such a matter unless the former Department attorney is screened and is apportioned no fee from the matter, and unless the firm notifies the government of the screening measures. See MODEL RULES OF PROF'L CONDUCT R. 1.11(b) (2004). The screen must be erected promptly. See Analytica, Inc. v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed – months after the lawyer had joined the firm."); see also United States v. Goot, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed*.") (emphasis added);

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[3] In evaluating this issue, an attorney also should consider 18 U.S.C. § 207(a)(1), which bars, inter alia, an individual from representing any other person before a Federal department, agency, or court in connection with particular matters involving specific parties in which that individual participated "personally and substantially" while serving in his government position. See United States v. Trafficante, 328 F.2d 117 (5th Cir. 1961) (former Internal Revenue Service attorney who handled income tax claims against defendants was disqualified under both Section 207 and the rules of professional conduct from representing defendants in subsequent suits regarding balance due on those income taxes); United States v. Martin, 39 F. Supp. 2d 1333, 1334-35 (D. Utah 1999) (court disqualified former AUSA and concluded that his consultation on the issuance of subpoenas and other supervisory actions, "taken as a whole, creates the 'reasonable appearance' of significance" that amounted to personal and substantial participation under section 207).

Atasi Corp. v. Seagate Tech., 847 F.2d 826, 831 (Fed. Cir. 1988) (presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038 (E.D. Mich. 1995) (delay of 11 or 18 days in setting up ethical wall is too long).

This rule also imposes specific prohibitions on a former government attorney's use of confidential information. Model Rule of Professional Conduct 1.11(c) (2004) provides:

> Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

This rule prohibits former Department attorneys from representing a client in a private matter that would be adverse to a person about whom they have confidential government information as a result of their employment with the Department. Based on the proscriptions in this rule, and those discussed below regarding Model Rule 1.9(c), former Department attorneys likely would be precluded from participating in any matters in which confidential government information they learned while a Department attorney would be relevant to the private matter.

In addition, Model Rule of Professional Conduct 1.11(d)(2)(ii) (2004) also places restrictions on a Department attorney's ability to negotiate for private employment. This rule states in relevant part:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which

> the lawyer is participating personally and substantially. . . .

Accordingly, to the extent a Department attorney works on the substance of a particular matter, he or she would be prohibited from negotiating for employment with anyone who is involved in that same matter.[4]

Who May Consent to an Attorney's Representation Notwithstanding a Conflict of Interest

The individual who may provide consent to a former Department attorney's work on a case notwithstanding a conflict of interest will vary and depend on a number of factors. In many instances, the United States Attorney for the former AUSA's Office or the Assistant Attorney General for the component in which the former Department attorney worked will be the individual who may provide the requisite consent, but depending on the nature of the conflict, someone at a higher level may need to provide consent.

The Duty to Maintain Client Confidences

Confidentiality is one of the core duties an attorney owes his client. See In re Am. Airlines, 972 F.2d 605, 619 (5th Cir. 1992) ("[A] lawyer's obligation of confidentiality must be seen as part of the lawyer's primary duty of loyalty . . . ."); Greig v. Macy's Northeast, Inc., 1 F. Supp. 2d 397, 400 (D.N.J. 1998) (The duty of confidentiality is "basic to the

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[4] Department attorneys also should bear in mind that the Standards of Conduct impose additional restrictions on their ability to negotiate for other employment. See 5 C.F.R. § 2635.604. This provision requires that any employee who is "seeking employment" with a particular employer must disqualify him/herself from participating in any matter involving the prospective employer.

The definition of "seeking employment" is broader than what might otherwise be the common-sense definition of the phrase. "Seeking employment" is defined in the Standards of Conduct to include situations in which an employee is engaged in negotiations with any person with a view toward reaching agreement regarding possible employment. However, it also includes an *unsolicited* communication with a person *or* an intermediary regarding possible employment with that person, if that communication solicits any response other than a rejection. Id.

For further guidance on this issue, current and former Assistant United States Attorneys should consult with the Office of General Counsel in the Executive Office for United States Attorneys; current and former Main Justice attorneys should consult with the Departmental Ethics Office in the Justice Management Division.

legitimate practice of law.").

This duty is codified in ABA Model Rule of Professional Conduct 1.6(a), which provides, in relevant part, that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . [or] the disclosure is impliedly authorized in order to carry out the representation. . . ." MODEL RULES OF PROF'L CONDUCT R.1.6(a) (2004); see also id. R. 1.8(b) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."). "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Id. R.1.6, cmt. 3 (emphasis added); see Stepak v. Addison, 20 F.3d 398, 406 (11th Cir. 1994). Other precedent provides that information obtained in the course of an attorney-client relationship is required to be "sheltered from use," regardless of who else may know of it, because of the duty of loyalty inherent in that relationship. See Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 172 (5th Cir. 1979) (rejecting the idea that an attorney is relieved from his duty to protect confidential information because both parties are privy to it as a result of prior joint representation.). The phrase "information relating to the representation" has been interpreted to include a broad spectrum of information, including information that may not itself be protected but reasonably could lead to the discovery of such information by third persons. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 4 (2004); ABA Comm. on Ethics and Prof'l Responsibility, Formal Ethics Op. 98-411 (1998) (noting that, in lawyer-to-lawyer consultations, use of hypotheticals that enable another lawyer to determine identity of one's client may, under some circumstances, violate Rule 1.6); United States v. Stepney, 246 F. Supp. 2d 1069, 1073 (N.D. Cal. 2003) ("The ethical rules governing attorneys require that all information pertaining to a client's case be kept confidential.").

The prohibition on the disclosure of client confidences applies in any context, including statements made when employed as a television commentator or consultant, statements made at a Congressional hearing (even when appearing pursuant to a subpoena), comments made to the media, oral presentations and publications such as a book or an article.[5] Whether a former Department attorney properly may make certain statements or act

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[5] Department attorneys also should bear in mind that, prior to terminating employment with the Department, they are prohibited from making or negotiating "an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." See MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2004). Courts routinely have criticized lawyers who make arrangements to benefit from the publication of their client's stories. See, e.g., United States v. Hearst, 638 F.2d 1190, 1197-98 (1st Cir. 1980) (lawyer admonished for contracting to

as a legal commentator in a particular situation likely would depend on the specific facts on which the attorney would be commenting. It may be difficult to divorce what an attorney learned as a client confidence from the publicly available information, such that an attorney's comments would be free from the effect of the client confidences. As one district court has opined in this regard:

> Advice and information about how to conduct lemon law litigation against various manufacturers, including GM, along with form pleadings and interrogatories, proliferate in legal periodicals, practice manuals, law review articles, textbooks, and through bar association conferences and publications. However, this is true of just about every type of matter there is to litigate. The information age has not neglected the legal profession, and step-by-step checklists on litigating a particular type of case can be found in every law library and computerized legal database in the country. The fact that this type of information is publicly available does not make "information relating to the representation" of GM "generally known." Rule 1.9(a)(2) also contemplates knowledge of the decision-making processes of GM personnel regarding legal claims, the internal workings of the GM organization, the particular personalities, expectations, negotiating techniques, and management styles of GM personnel, historical and technical information regarding GM vehicles, and GM claims handling processes and procedures. This type of information is protected by the attorney-client relationship whether the matter involves a complicated legal issue, such as in antitrust law, or whether it involved the "*pro forma*" litigation of lemon law claims. It would be available to someone whose extensive experience as a local counsel for GM legal and technical personnel and who was trusted enough for his firm to be one of only a few granted blanket settlement authority by GM, but it is not generally known.

Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D.N.J. 1995).

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write a book about his client's case while the representation was ongoing); The Florida Bar v. Niles, 644 So. 2d 504, 507 (Fla. 1994) (lawyer was suspended for, inter alia, having his client interviewed for a television program without her consent).

Does the Duty to Maintain Client Confidences Change Once an Attorney Leaves the Department?

The duty of confidentiality continues after the attorney-client relationship has terminated. See MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 18 (2004); Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (the attorney-client privilege survives the client's death). Consequently, even after attorneys leave the Department, they may not reveal the United States' confidences absent the United States' consent. Likewise, former Department attorneys may not use confidential information to the United States' detriment unless the United States consents or the information is "generally known." See MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2004) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to the client, or when the information has become generally known . . . ."); id. R. 1.9(c)(2)("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

The term "generally known" is not clearly defined in the professional responsibility rules or the legal jurisprudence. Some courts and legal treatises have concluded that information does not become "generally known" simply because it is made public. Rather, the manner of its disclosure and subsequent accessibility are the determinative factors:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-date storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known . . . . A lawyer may not justify adverse use or disclosure of client information simply because the information

> has become known to third persons, if it is not otherwise generally known.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59, cmt. d (2000); see NCK Org. v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976) ("The client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.'") (quoting Emle Indus., Inc. v. Patentex, 478 F.2d 562, 572-73 (2d Cir. 1973) (quoting H. Drinker, Legal Ethics 135 (1953))); Tiuman v. Canant, No. 92 Civ. 5813 (JFK), 1994 U.S. Dist. Lexis 6626, at *10 (S.D.N.Y. May 19, 1994) (even if lawyer had privileged information already known to his current clients, the former client's "privilege in this information as disclosed to his attorney . . . is not thereby nullified"); Steel, 912 F. Supp. at 739 (that information is publicly available does not necessarily mean that information relating to the representation is "generally known"); Buckley v. Airshield Co., 908 F. Supp. 299, 306 (D. Md. 1995) (client's privilege in confidential information is not lost when the information is part of the public record); Cohen v. Wolgin, CIV. A. No. 97-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993). Other courts subscribe to the view that information is "generally known" when it is a matter of public record. See Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 9 F. Supp. 2d 572, 580 (W.D.N.C. 1998) (without further discussion, opining that matters of public record are not considered to be confidential); Jones & Henry Eng'rs, Ltd. v. Town of Orland, 942 F. Supp. 1202, 1208 (N.D. Ind. 1996) (same); Unisys Corp. v. Amperif Corp., Civ. A. No. 92-1966, 1992 WL 210243, at *4 (E.D. Pa. Aug. 20, 1992) ("[a]ny information appearing on documents open to public inspection has passed into the public domain and become general knowledge").

At bottom, the duty to maintain client confidences does not change in any significant respect after the Department attorney leaves the Department. In many instances, former Department attorneys will be prohibited from disclosing the United States' confidences, unless the United States consents. The individual who could consent to the disclosure of client confidences would be the same individual who could consent to representation by a lawyer notwithstanding a conflict of interest.

Conclusion

The rules on client confidences and conflicts of interest may impose substantial restrictions on a Department attorney's post-employment activities.[6] PRAO is available to

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[6] This memorandum is not intended to include a discussion of every statute or professional conduct rule that may be implicated upon your departure from the Department.

provide specific advice on the issues discussed in this memorandum to individual Department attorneys before they leave the Department.

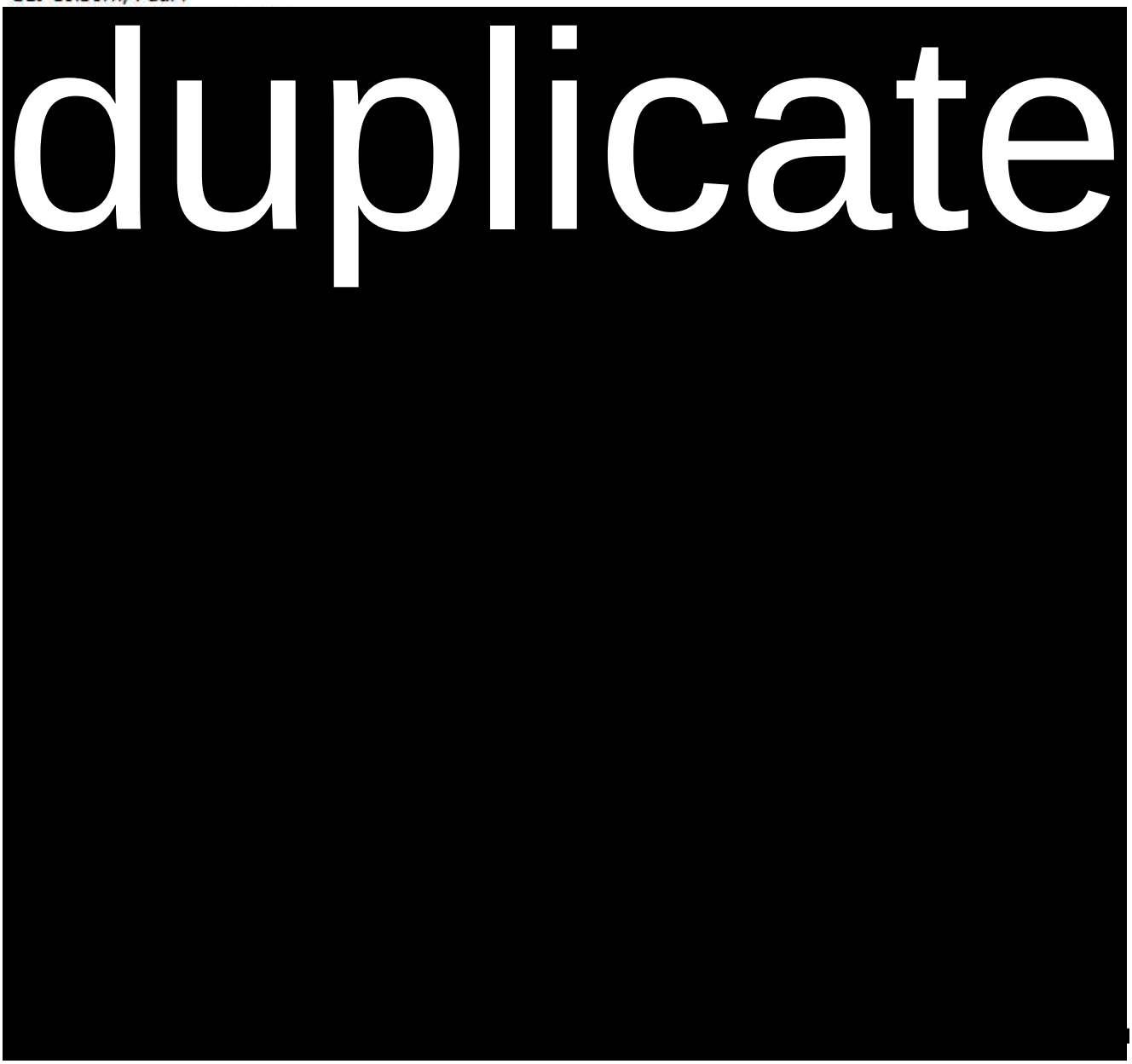
There may be other statutes or rules that you should consider. See, e.g. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004) (generally prohibits an attorney from making an extrajudicial statement that has a substantial likelihood of materially prejudicing an adjudicative proceeding in which the attorney is participating or has participated).

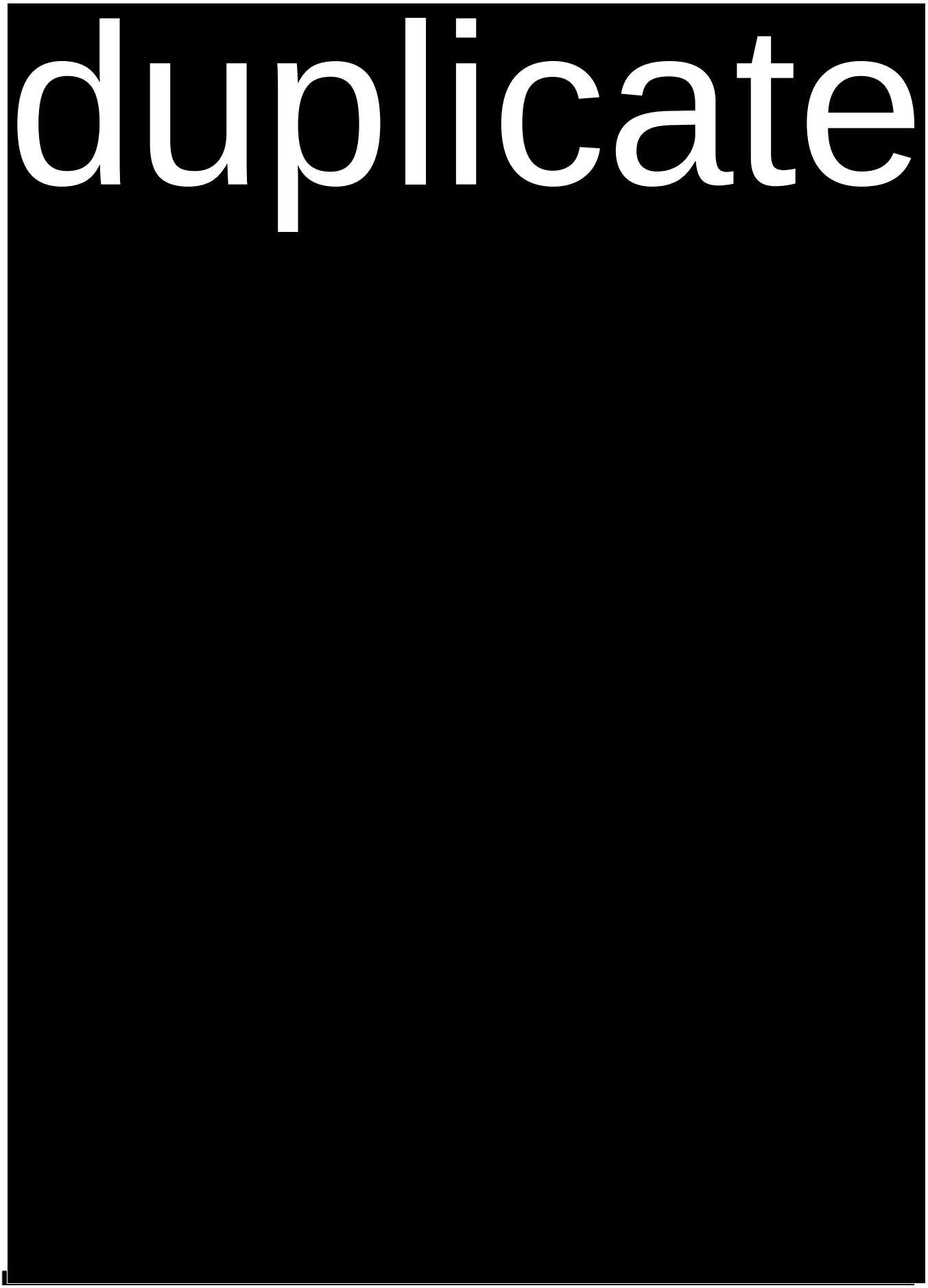
Bradbury, Steve

From: Bradbury, Steve
Sent: Tuesday, August 7, 2007 4:50 PM
To: Elwood, John; Eisenberg, John
Subject: FW: your comments
Attachments: Post Employment Issues Full Distribution (August 2005).wpd

FYI

From: Bradbury, Steve
Sent: Tuesday, August 07, 2007 4:50 PM
To: 'Jack Goldsmith'
Cc: Colborn, Paul P





duplicate

Bradbury, Steve

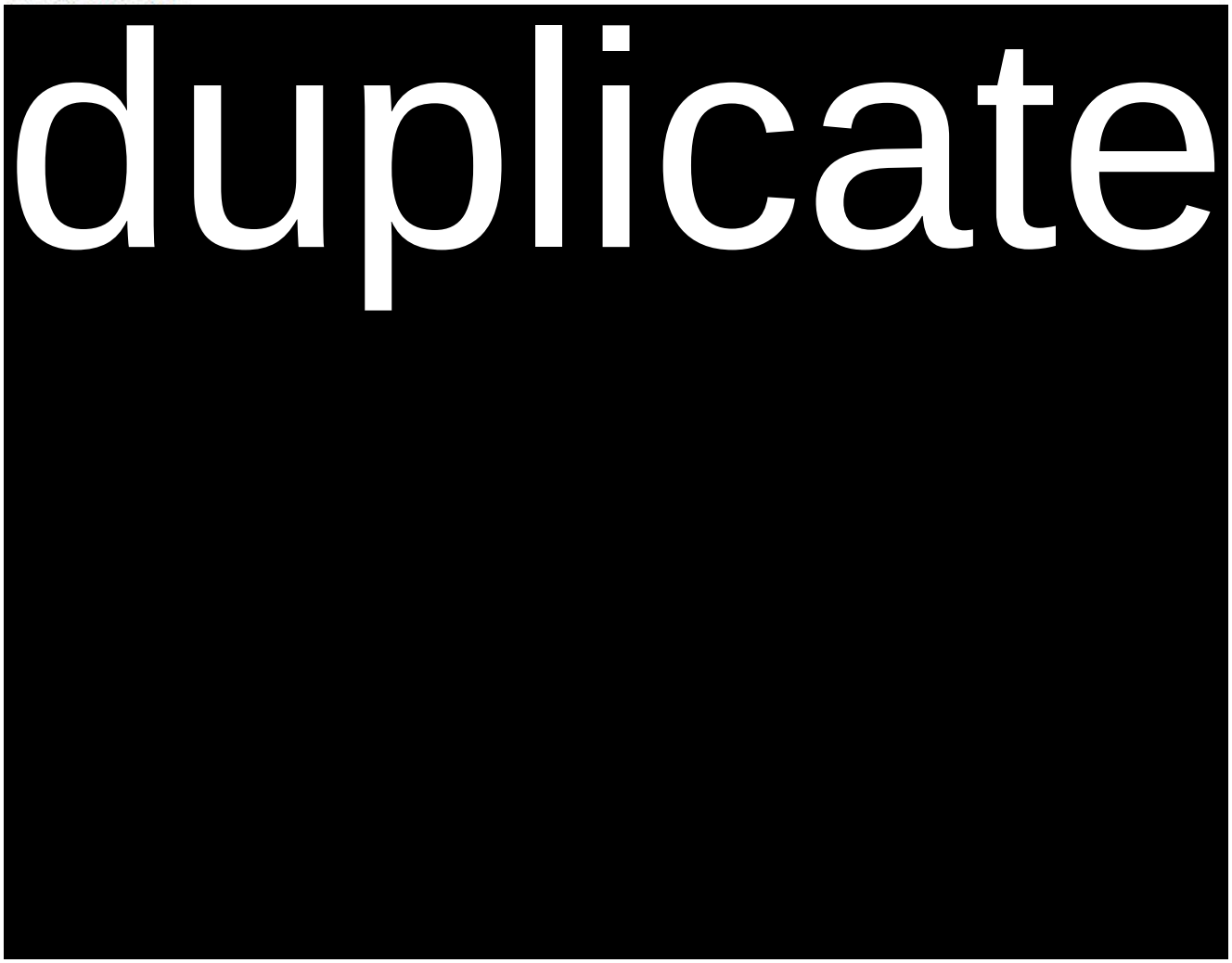
From: Bradbury, Steve
Sent: Monday, August 13, 2007 1:15 PM
To: Colborn, Paul P
Subject: Re: your comments

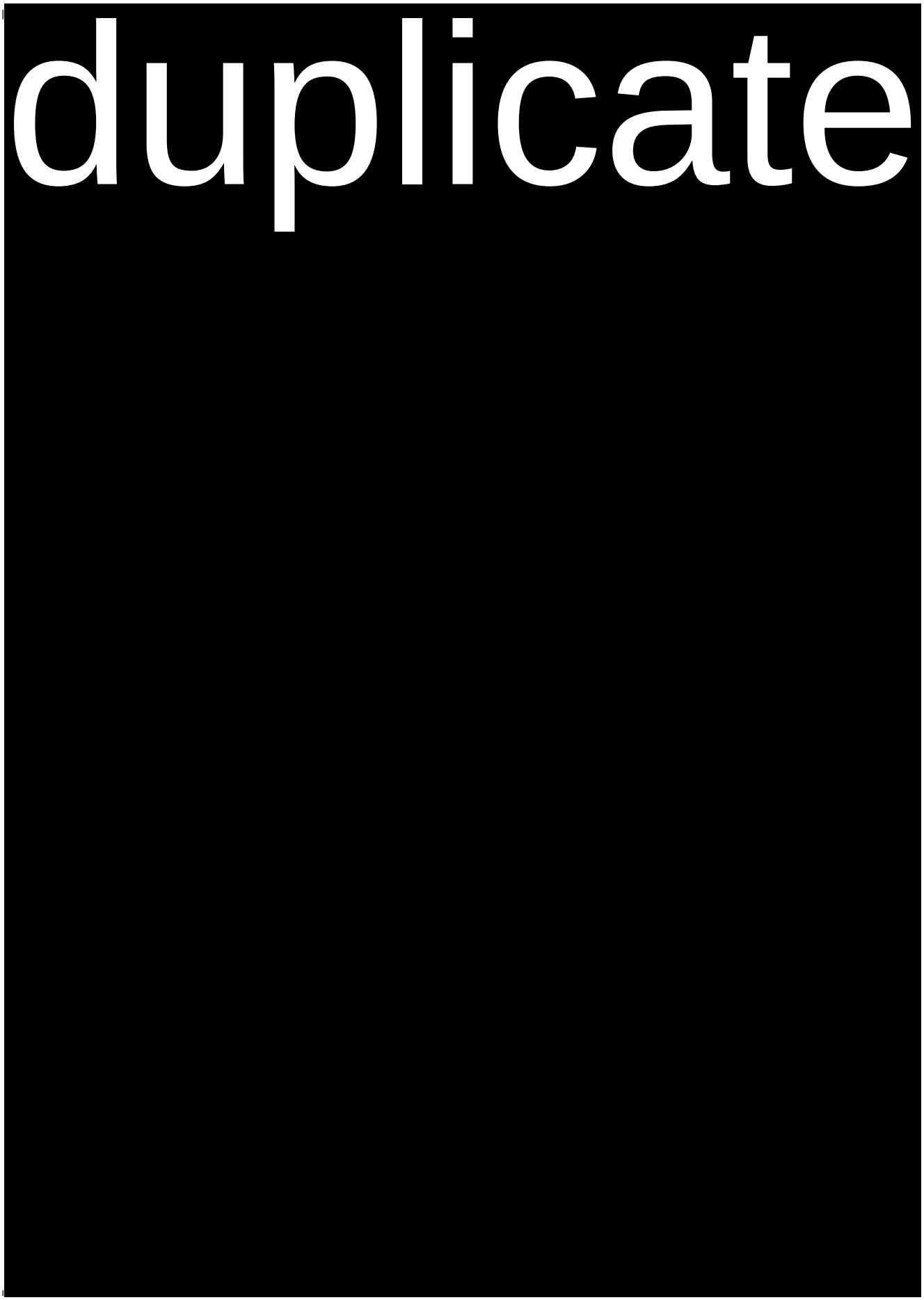
No

----- Original Message -----
From: Colborn, Paul P
To: Bradbury, Steve
Sent: Mon Aug 13 12:28:16 2007
Subject: RE: your comments

Has Jack responded?

From: Bradbury, Steve
Sent: Tuesday, August 07, 2007 4:50 PM
To: 'Jack Goldsmith'
Cc: Colborn, Paul P





Jack Goldsmith

From:	Jack Goldsmith
Sent:	Monday, August 27, 2007 7:30 PM
To:	Bradbury, Steve
Subject:	follow-up

Steve:

I am sad for Judge Gonzales to learn of his resignation. It must be a tough time at the Depatrment.

I am following up on our email exchange of a month ago concerning my book. I do not want to have a back and forth over passages. Here is a more complete statement of my views on the matter.

1. During the three years since I resigned from OLC, I have been silent about the issues of enormous public and historical importance that occurred before and during my tenure at OLC, and that have been publicly discussed and debated by government officials, pundits, scholars, and many other citizens. I decided to write *The Terror Presidency* because I believe that OLC and DOJ were severely damaged by the events of 2001-2003, and in the hope that the book might, in some small way, help avoid repetition of the monumental errors committed during this period. I also believe it important to explain to the public and to future administrations the pressures and pathologies that currently dominate legal decision-making inside the executive branch. I tried to write a serious, sober, and fair-minded book. I am donating the royalties from the book, after deducting some of my expenses, to charities for children of soldiers and CIA officers killed in action, and to my church.

2. The book speaks very selectively about internal discussions of issues that are well known publicly. The book does not discuss the substance of any legal advice that was provided by OLC unless that legal advice has already been put on the public record by statements or testimony of other officials, including, in some instances, the Attorney General. In addition, I considered but chose not to include many dozens of non-classified conversations, deliberations, and episodes that were relevant to the themes in the book but that concerned issues or legal advice that was not publicly known. Even after taking these precautions, I deleted and modified some passages in response to your comments.

3. I have read dozens of books, articles, and interviews by former DOJ lawyers that reveal very intimate internal executive branch deliberations, including legal conversations between the Department of Justice and the White House or the President. These books, articles, and interviews are authored by, among many others, Attorneys General Robert Jackson, Francis Biddle, Robert Kennedy, William French Smith, Elliot Richardson, Edwin Meese, and Richard Thornburgh, Deputy Attorneys General Nicholas Katzenbach, Warren Christopher and Jim Comey, OLC

Attorneys General Nicholas Katzenbach, Warren Christopher and Jim Comey, OLC heads Norbert Schlei and Douglas Kmiec, Solicitors General Charles Fried, Drew Days, Rex Lee, and Robert Bork, and prosecutors Leon Jaworksi, and Lawrence Walsh. I have also read similar books and articles by non-DOJ government lawyers, including legal advisers Abram Chayes and Abe Sofaer, and those who served in the White House Counsel's Office, including John Dean, Leonard Garment, and Theodore Sorenson. These distinguished lawyers felt it important that the American people understand how and why critical decisions were made during their service in government.

4. I also note that many former Bush administration lawyers – including Jim Comey, John Yoo, Brad Berenson, Tim Flanigan, and Will Taft – have spoken on the record in the press and in testimony about intimate internal executive branch conversations and deliberations. These men too, I believe, felt it important that the American people understand how and why critical decisions were made during their service in government. I am unaware of complaints from the Justice Department or elsewhere in the government about their revelations in the press and testimony.

5. I have again come to the conclusion that I have no legal obligation to delete the material you have asked me to delete. I base that conclusion on the factors and customs listed above, as well as on the plain language of the regulations and the agreements I have signed on nondisclosure of classified information, the associated prepublication review (I have been advised that the government has no objection to the manuscript on classification grounds), conversations during the past year or so with OLC officials, and my own experience as head of OLC. Finally, I feel a strong obligation to the Constitution and the rule of law. The First Amendment not only gives citizens the right to speak but also implies, in my view, a duty to speak when the government has committed wrongs or abuses. I was privileged to serve in senior positions in the government. Despite the understated tone in my book, I was deeply disturbed by some of the conduct I observed in the executive branch, and I cannot remain silent and merely hope that our nation will not repeat these mistakes.

Thanks, Steve, and good luck in the hard weeks and months ahead.

Jack

Colborn, Paul P

From: Colborn, Paul P
Sent: Tuesday, September 4, 2007 10:40 AM
To: Bradbury, Steve; Elwood, John; Eisenberg, John
Subject: FW: Jack Goldsmith
Attachments: 09rosen.html

fyi

From: Sessoms, GayLa
Sent: Tuesday, September 04, 2007 10:38 AM
To: Kennedy, Lionel; Colborn, Paul P; Steele, Charles (NSD)
Subject: Jack Goldsmith

<<09rosen.html>>

September 9, 2007
Magazine Preview

Conscience of a Conservative

By JEFFREY ROSEN

This article will appear in the Sept. 9 issue of the magazine.

In the fall of 2003, Jack L. Goldsmith was widely considered one of the brightest stars in the conservative legal firmament. A 40-year-old law professor at the University of Chicago, Goldsmith had established himself, with his friend and fellow law professor John Yoo, as a leading proponent of the view that international standards of human rights should not apply in cases before U.S. courts. In recognition of their prominence, Goldsmith and Yoo had been anointed the "New Sovereigntists" by the journal Foreign Affairs.

Goldsmith had been hired the year before as a legal adviser to the general counsel of the Defense Department, William J. Haynes II. While at the Pentagon, Goldsmith wrote a memo for Defense Secretary Donald Rumsfeld warning that prosecutors from the International Criminal Court might indict American officials for their actions in the war on terror. Goldsmith described this threat as "the judicialization of international politics." No one was surprised when he was hired in October 2003 to head the Office of Legal Counsel, the division of the Justice Department that advises the president on the limits of executive power. Immediately, the job put him at the center of critical debates within the Bush administration about its continuing response to 9/11 — debates about coercive interrogation, secret surveillance and the detention and trial of enemy combatants.

Nine months later, in June 2004, Goldsmith resigned. Although he refused to discuss his resignation at the time, he had led a small group of administration lawyers in a behind-the-scenes revolt against what he considered the constitutional excesses of the legal policies embraced by his White House superiors in the war on terror. During his first weeks on the job, Goldsmith had discovered that the Office of Legal Counsel had written two legal opinions — both drafted by Goldsmith's friend Yoo, who served as a deputy in the office — about the authority of the executive branch to conduct coercive interrogations. Goldsmith considered these opinions, now known as the "torture memos," to be tendentious, overly broad and legally flawed, and he fought to change them. He also found himself challenging the White House on a variety of other issues, ranging from surveillance to the trial of suspected terrorists. His efforts succeeded in bringing the Bush administration somewhat closer to what Goldsmith considered the rule of law — although at considerable cost to Goldsmith himself. By the end of his tenure, he was worn out. "I was disgusted with the whole process and fed up and exhausted," he told me recently.

After leaving the Office of Legal Counsel, Goldsmith was uncertain about what, if anything, he should say

publicly about his resignation. His silence came to be widely misinterpreted. After leaving the Justice Department, he accepted a tenured professorship at Harvard Law School, where he currently teaches. During his first weeks in Cambridge, in the fall of 2004, some of his colleagues denounced him for what they mistakenly assumed was his role in drafting the torture memos. One colleague, Elizabeth Bartholet, complained to a Boston Globe reporter that the faculty was remiss in not investigating any role Goldsmith might have played in "justifying torture." "It was a nightmare," Goldsmith told me. "I didn't say anything to defend myself, except that I didn't do the things I was accused of."

Now Goldsmith is speaking out. In a new book, "The Terror Presidency," which will be published later this month, and in a series of conversations I had with him this summer, Goldsmith has recounted how, from his first weeks on the job, he fought vigorously against an expansive view of executive power championed by officials in the White House, including Alberto Gonzales, who was then the White House counsel and who recently resigned as attorney general, and David Addington, who was then Vice President Cheney's legal adviser and is now his chief of staff. Goldsmith says he is not speaking out for the money; though he received a low six-figure advance for the book, he is, after deducting some minor expenses, donating the advance and any profits to charity. Nor is he speaking out because he disagrees with the basic goals of the Bush administration in the war on terror. "I shared, and I still share, a lot of their concerns about what we have to do to meet the terrorist threat," he told me. When I asked whether he thought Gonzales should have resigned and whether Addington should follow, he demurred. "I was friends with Gonzales and feel very sorry for him," he said. "We got along really well. I admired and respected Addington, even when I thought his judgment was crazy. They thought they were doing the right thing."

Goldsmith told me that he has decided to speak publicly about his battles at the Justice Department because he hopes that "future presidents and people inside the executive branch can learn from our mistakes." In his view, American presidents for the foreseeable future will, like George W. Bush, face enormous pressure to be aggressive and pre-emptive in taking measures to prevent another terrorist attack in the United States. At the same time, Goldsmith notes, everywhere the president looks, critics — as well as his own lawyers — are telling him that pre-emptive actions may violate international law as well as U.S. criminal law. What, exactly, are the legal limits of executive power in the post-9/11 world? How should administration lawyers negotiate the conflict between the fear of attacks and the fear of lawsuits?

In Goldsmith's view, the Bush administration went about answering these questions in the wrong way. Instead of reaching out to Congress and the courts for support, which would have strengthened its legal hand, the administration asserted what Goldsmith considers an unnecessarily broad, "go-it-alone" view of executive power. As Goldsmith sees it, this strategy has backfired. "They embraced this vision," he says, "because they wanted to leave the presidency stronger than when they assumed office, but the approach they took achieved exactly the opposite effect. The central irony is that people whose explicit goal was to expand presidential power have diminished it."

I have known Goldsmith since we were at law school together. In addition to being intellectually curious and having good judgment, he always struck me as a pragmatic rather than an ideological conservative. Born in 1962 in Memphis, Goldsmith is the son of a former Miss Teenage Arkansas whose parents ran a celebrated nightclub. Growing up, he had two stepfathers, one of whom he describes in the book as "a mob-connected Teamsters executive" who was "Jimmy Hoffa's right-hand man and for decades a leading suspect in Hoffa's disappearance." His upbringing seems to have contributed to his down-to-earth sensibility. After earning

disappearance. His upbringing seems to have contributed to his down-to-earth sensibility. After earning degrees at Washington and Lee University and Oxford, he thrived at Yale Law School, where he developed what he calls "an allergic reaction to Yale's left-wing jurisprudence and political correctness." He later clerked for Justice Anthony Kennedy on the Supreme Court and taught law at the Universities of Virginia and Chicago. He is married, and he and his wife have two sons.

When Goldsmith was asked, four years ago, to head the Office of Legal Counsel at the Justice Department, he jumped at the opportunity. Working for the office is one of the most prestigious jobs in government: former heads and deputies include the Supreme Court Justices William H. Rehnquist, Antonin Scalia and Samuel A. Alito Jr. The Office of Legal Counsel interprets all laws that bear on the powers of the executive branch. The opinions of the head of the office are binding, except on the rare occasions when they are reversed by the attorney general or the president.

In the post-9/11 era, the office has played a crucial role in providing legal cover to jittery bureaucrats fearful that officials in the White House, Defense and State Departments or the C.I.A. might be prosecuted for their actions in the war on terror. The Justice Department, after all, is the branch of government responsible for prosecutions, and its own prosecutors — as well as independent counsels — would be hard pressed to prosecute someone who had relied on the department's own opinions in good faith. For this reason, the office has two important powers: the power to put a brake on aggressive presidential action by saying no and, conversely, the power to dispense what Goldsmith calls "free get-out-of jail cards" by saying yes. Its opinions, he writes in his book, are the equivalent of "an advance pardon" for actions taken at the fuzzy edges of criminal laws.

In the Bush administration, however, the most important legal-policy decisions in the war on terror before Goldsmith's arrival were made not by the Office of Legal Counsel but by a self-styled "war council." This group met periodically in Gonzales's office at the White House or Haynes's office at the Pentagon. The members included Gonzales, Addington, Haynes and Yoo. These men shared a belief that the biggest obstacle to a vigorous response to the 9/11 attacks was the set of domestic and international laws that arose in the 1970s to constrain the president's powers in response to the excesses of Watergate and the Vietnam War. (The Foreign Intelligence Surveillance Act of 1978, for example, requires that executive officials get a warrant before wiretapping suspected enemies in the United States.) The head of the Office of Legal Counsel in the first years of the Bush administration, Jay Bybee, had little experience with national-security issues, and he delegated responsibility for that subject matter to Yoo, giving him the authority to draft opinions that were binding on the entire executive branch.

Yoo was a "godsend" to a White House nervous about war-crimes prosecutions, Goldsmith writes in his book, because his opinions reassured the White House that no official who relied on them could be prosecuted after the fact. But Yoo's direct access to Gonzales angered his boss, Attorney General John Ashcroft, according to Goldsmith. (Neither Ashcroft nor Gonzales responded to requests for interviews for this article.) Ashcroft, Goldsmith says, felt that Gonzales and the war council were usurping legal-policy decisions that were properly entrusted to the attorney general, such as the creation of military commissions, which Gonzales supported and Ashcroft never liked.

The matter came to a head in the fall of 2003, when Bybee left the Office of Legal Counsel and Gonzales suggested Yoo as a candidate to lead it. Ashcroft rejected the suggestion. Yoo then recommended his friend

Goldsmith to the White House as a suitable alternative. Goldsmith interviewed with Ashcroft at the Justice Department and with Gonzales and Addington at the White House. In his interview with Addington and Gonzales, Goldsmith recalls talking about the dangers of international law and the importance of military commissions. He got the job.

Several hours after Goldsmith was sworn in, on Oct. 6, 2003, he recalls that he received a phone call from Gonzales: the White House needed to know as soon as possible whether the Fourth Geneva Convention, which describes protections that explicitly cover civilians in war zones like Iraq, also covered insurgents and terrorists. After several days of study, Goldsmith agreed with lawyers in several other federal agencies, who had concluded that the convention applied to all Iraqi civilians, including terrorists and insurgents. In a meeting with Ashcroft, Goldsmith explained his analysis, which Ashcroft accepted. Later, Goldsmith drove from the Justice Department to the White House for a meeting with Gonzales and Addington. Goldsmith remembers his deputy Patrick Philbin turning to him in the car and saying: "They're going to be really mad. They're not going to understand our decision. They've never been told no." (Philbin declined to discuss the conversation.)

In his book, Goldsmith describes Addington as the "biggest presence in the room — a large man with large glasses and an imposing salt-and-pepper beard" who was "known throughout the bureaucracy as the best-informed, savviest and most conservative lawyer in the administration, someone who spoke for and acted with the full backing of the powerful vice president, and someone who crushed bureaucratic opponents." When Goldsmith presented his analysis of the Geneva Conventions at the White House, Addington, according to Goldsmith, became livid. "The president has already decided that terrorists do not receive Geneva Convention protections," Addington replied angrily, according to Goldsmith. "You cannot question his decision." (Addington declined to comment on this and other details concerning him in this article.)

Goldsmith then explained that he agreed with the president's determination that detainees from Al Qaeda and the Taliban weren't protected under the Third Geneva Convention, which concerns the treatment of prisoners of war, but that different protections were at issue with the Fourth Geneva Convention, which concerns civilians. Addington, Goldsmith says, was not persuaded. (Goldsmith told me that he has checked his recollections of this and other meetings with at least one other participant or with someone to whom he described the meetings soon after.)

Months later, when Goldsmith tried to question another presidential decision, Addington expressed his views even more pointedly. "If you rule that way," Addington exclaimed in disgust, Goldsmith recalls, "the blood of the hundred thousand people who die in the next attack will be on your hands."

The conflict over the Geneva Conventions was just the beginning. About six weeks after he started work, Goldsmith became aware that there might be what he calls "potentially problematic" opinions drafted by the Office of Legal Counsel. These were the "torture memos," one of which was written in August 2002 and the other in March 2003. The August opinion defined torture as pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." Goldsmith concluded that this opinion defined torture far too narrowly. He also had concerns about the March 2003 opinion, the contents of which remain classified but which dealt with the military interrogation of aliens held outside the United States.

Goldsmith told me that he objected to what he calls the "extremely broad and unnecessary analysis of the president's commander in chief power" in the memos. The August opinion, for example, boldly concluded that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander in Chief authority in the President." Goldsmith says he believed at the time, and still does, that "this extreme conclusion" would call into question the constitutionality of federal laws that limit interrogation, like the War Crimes Act of 1996, which prohibits grave breaches of the Geneva Conventions, and the Uniform Code of Military Justice, which prohibits cruelty and maltreatment. He also found the tone of both opinions "tendentious" rather than cautious and feared that they might be interpreted as an attempt to immunize government officials for genuinely bad acts.

Yoo has acknowledged drafting the August 2002 memo, which he says was the basis for the interrogation of Abu Zubaydah, a top Al Qaeda operative. Yoo also wrote and signed the March 2003 opinion. His friendship with Goldsmith made it especially awkward for Goldsmith to criticize the memos. "I was basically taking steps to fix the mistakes of a close friend, who I knew would be mad about it," Goldsmith told me. "We don't talk anymore, and that's one of the many sad things about my time in government."

In December 2003, Goldsmith decided that he had to withdraw the March opinion — that is, he had to tell administration officials that they could no longer rely on it. "But figuring out how to withdraw it was very tricky," he told me, "since withdrawal would frighten everyone who relied on the opinions in a very sensitive area." In the past, the Office of Legal Counsel had occasionally changed its legal positions between presidential administrations to reflect different legal philosophies, but Goldsmith could find no precedent for the office withdrawing an opinion drafted earlier by the same administration — especially on a matter of such importance. Goldsmith concluded that he could immediately tell the Defense Department to stop relying on the March opinion, since he was confident that it was not needed to justify the 24 interrogation techniques the department was actually using, including two called "Fear Up Harsh" and "Pride and Ego Down," which were designed to make subjects nervous without crossing the line into coercion. But the withdrawal of the August opinion was a much harder call. The August opinion provided the legal foundation for the C.I.A.'s interrogation program, Goldsmith says, which he considered much closer to the legal line. (He refused to discuss the details of the program.)

Goldsmith, however, says he didn't have the time or resources to create a replacement opinion immediately. In his initial months on the job, his attention was focused on the more pressing matter of addressing legal issues surrounding the terrorist-surveillance program. In April 2004, however, Goldsmith's priorities were reversed when the Abu Ghraib scandal broke. Then, in June of that year, Yoo's August 2002 opinion was leaked to the media. "After the leak, there was a lot of pressure on me within the administration to stand by the opinion," Goldsmith told me, "and the problem was that I had decided six months earlier that I couldn't stand by the opinion."

A week after the leak of Yoo's August 2002 memo, Goldsmith withdrew the opinion. Goldsmith made the decision himself, in consultation with Philbin and Deputy Attorney General James B. Comey, both of whom, Goldsmith says, agreed it was the right thing to do. He then told Ashcroft, who was, Goldsmith writes, "unbelievably magnanimous: it had happened on his watch, and he could have overruled me, and he didn't." Goldsmith was concerned, however, that the White House might overrule him. So he made a strategic decision: on the same day that he withdrew the opinion, he submitted his resignation, effectively forcing the

administration to choose between accepting his decision and letting him leave quietly, or rejecting it and turning his resignation into a big news story. "If the story had come out that the U.S. government decided to stick by the controversial opinions that led the head of the Office of Legal Counsel to resign, that would have looked bad," Goldsmith told me. "The timing was designed to ensure that the decision stuck."

Again, according to Goldsmith, Addington was furious. During his brief time in office, Goldsmith had withdrawn not only the two torture opinions but also others. (He refused to discuss the other opinions with me.) In the end, he says, he had withdrawn more opinions than any of his predecessors. Shortly before he resigned, Goldsmith says, Addington confronted him in Gonzales's office, pulling out of his jacket pocket a 3-by-5 card that listed the withdrawn opinions. "Since you've withdrawn so many legal opinions that the president and others have been relying on," Addington said, according to Goldsmith, "we need you to ... let us know which [of the remaining] ones you still stand by." Goldsmith recalls that Gonzales, in his own farewell chat with him, said, "I guess those opinions really were as bad as you said."

Looking back, Goldsmith says, he criticizes but does not vilify Yoo, whom he believes wrote and defended the opinions in good faith. Praising Yoo's "knowledge, intelligence and energy," he writes in his book that "the poor quality of a handful of very important opinions is probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House and Yoo's unusually expansive and self-confident conception of presidential power."

I have known Yoo since we were in law school together as well, and I called him for a response. "I think Jack and I had a good-faith disagreement, but I think at some level this was elevating form over substance," he said. Yoo said that in writing the torture memo, he experienced no pressure from the White House, which he described as "hands off." Instead, he said, "there was an urgency to decide so that valuable intelligence could be acquired from Abu Zubaydah, before further attacks could occur." Yoo says it is his understanding that no policies or interrogation techniques changed as a result of the withdrawal of the torture memo, noting that all policies that were legal under the withdrawn opinions are also acknowledged as legal under the opinion that eventually replaced the withdrawn ones. (That opinion was issued in December 2004, six months after Goldsmith's resignation, and was signed by Daniel Levin, his acting successor as head of the Office of Legal Counsel.)

Yoo also rejects the criticism that his reasoning was unnecessarily broad, describing the criticism of his opinion as something that could have been made only with the benefit of hindsight. "You can claim it's too broad after the policy has been decided on, but I didn't have that luxury in the spring of 2002," he told me. "If you're providing the legal advice before they choose the policy, how could you know?"

Goldsmith puts the bulk of the responsibility for the excesses of the Office of Legal Counsel on the White House. "I probably had a hundred meetings with Gonzales, and there was only one time I was talking about a national-security issue when Addington wasn't there," Goldsmith told me. "My conflicts were all with Addington, who was a proxy for the vice president. They were very, very stressful."

During his tenure at the Office of Legal Counsel, Goldsmith also clashed with Addington over the detention and trial of suspected terrorists. In January 2004, the Supreme Court agreed to review a lower-court decision approving the detention of Yaser Hamdi, an American citizen then being held as an enemy combatant. A group of administration lawyers including Goldsmith met with Gonzales and Addington in

combatant. A group of administration lawyers including Goldsmith met with Gonzales and Addington in Gonzales's office to discuss the implications of the case. "Why don't we just go to Congress and get it to sign off on the whole detention program?" Goldsmith recalls asking, reasoning that the Supreme Court would be less likely to strike down a detention program in wartime if Congress had explicitly supported it. According to Goldsmith, Addington shot down the idea.

Not long before Goldsmith left, the Supreme Court approved in June 2004, in the Hamdi case, the detention power itself but put some modest restrictions on the administration's ability to detain citizens without trial. Afterward, Gonzales, Addington, Goldsmith and others, including the deputy solicitor general, Paul Clement, met again, Goldsmith recalls, and he and Clement again proposed going to Congress to put the administration's legal strategy on a more sound footing. Once again, Goldsmith told me, the advice was ignored, and the White House continued to operate as if it assumed it could avoid a strong rebuke from the Supreme Court.

That rebuke finally arrived, however, last year in the Hamdan case, when the Supreme Court rejected the administration's claim that it could try suspected terrorists in military commissions created without Congressional approval. In a further blow to the administration, the court held that the legal protections of "common article 3" of the Geneva Conventions, which contains minimal protections for detainees in wartime, also applied in the war against Al Qaeda. Goldsmith says he believes this ruling was "legally erroneous" but "hugely consequential." It provided detainees at Guantánamo with more rights than the administration had ever acknowledged, and it implied that the War Crimes Act might be used to prosecute administration officials for their treatment of detainees.

In debates over the detention of suspected terrorists, Goldsmith says he was struck by how Addington's efforts to expand presidential power ultimately weakened it. In September 2006, two months before the midterm elections, Bush eventually did ask Congress to approve his military commissions, and Congress promptly passed a law that gave him everything he asked for, authorizing many aspects of the military commissions that the Supreme Court had struck down. Although Bush had won the battle, Goldsmith sees the refusal to go to Congress earlier as the cause of an unnecessary Supreme Court defeat. "I'm not a civil libertarian, and what I did wasn't driven by concerns about civil liberties per se," he told me. "It was a disagreement about means, not ends, driven by a desire to make sure that the administration's counterterrorism policies had a firm legal foundation."

In Goldsmith's estimation, the unnecessary unilateralism of the Bush administration reached its apex in the controversy over wiretapping and secret surveillance. Goldsmith says he did not originally intend to mention the surveillance controversy in his book. But he says he was infuriated, soon before finishing his manuscript, to be handed a subpoena in Cambridge by F.B.I. agents ordering him to testify in a criminal investigation into the leaks that resulted in stories by James Risen and Eric Lichtblau in The New York Times about the National Security Agency's warrentless wiretapping. After having a public conversation with the F.B.I. in the middle of Harvard Square about aspects of the terrorist-surveillance program, Goldsmith concluded he could discuss the same topics in his book.

Goldsmith emphasizes that he was not opposed to investigating the leak, which he agreed with President Bush did "great harm to the nation." In addition, he shared the White House's concern that the Foreign Intelligence Surveillance Act might prevent wiretaps on international calls involving terrorists. But Goldsmith

deplored the way the White House tried to fix the problem, which was highly contemptuous of Congress and the courts. "We're one bomb away from getting rid of that obnoxious [FISA] court," Goldsmith recalls Addington telling him in February 2004.

In his book, Goldsmith claims that Addington and other top officials treated the Foreign Intelligence Surveillance Act the same way they handled other laws they objected to: "They blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations," he writes. Goldsmith's first experienced this extraordinary concealment, or "strict compartmentalization," in late 2003 when, he recalls, Addington angrily denied a request by the N.S.A.'s inspector general to see a copy of the Office of Legal Counsel's legal analysis supporting the secret surveillance program. "Before I arrived in O.L.C., not even N.S.A. lawyers were allowed to see the Justice Department's legal analysis of what N.S.A. was doing," Goldsmith writes.

Goldsmith also witnessed perhaps the most well-known confrontation over the administration's aggressive tactics: the scene at Ashcroft's hospital bed on March 10, 2004, when Gonzales and Andrew Card, the White House chief of staff, visited the hospital to demand that the ailing Ashcroft approve, over Goldsmith and Comey's objections, a secret program that was about to expire. (Goldsmith refuses to identify the program, but Robert S. Mueller III, the F.B.I. director, has publicly indicated it was the terrorist surveillance program.) As he recalled it to me, Goldsmith received a call in the evening from his deputy, Philbin, telling him to go to the George Washington University Hospital immediately, since Gonzales and Card were on the way there. Goldsmith raced to the hospital, double-parked outside and walked into a dark room. Ashcroft lay with a bright light shining on him and tubes and wires coming out of his body.

Suddenly, Gonzales and Card came in the room and announced that they were there in connection with the classified program. "Ashcroft, who looked like he was near death, sort of puffed up his chest," Goldsmith recalls. "All of a sudden, energy and color came into his face, and he said that he didn't appreciate them coming to visit him under those circumstances, that he had concerns about the matter they were asking about and that, in any event, he wasn't the attorney general at the moment; Jim Comey was. He actually gave a two-minute speech, and I was sure at the end of it he was going to die. It was the most amazing scene I've ever witnessed."

After a bit of silence, Goldsmith told me, Gonzales thanked Ashcroft, and he and Card walked out of the room. "At that moment," Goldsmith recalled, "Mrs. Ashcroft, who obviously couldn't believe what she saw happening to her sick husband, looked at Gonzales and Card as they walked out of the room and stuck her tongue out at them. She had no idea what we were discussing, but this sweet-looking woman sticking out her tongue was the ultimate expression of disapproval. It captured the feeling in the room perfectly."

Goldsmith, Comey, Mueller and other Justice Department officials were prepared to resign en masse if the White House implemented the program over their objections. Two days later, Comey had a conversation at the White House with Bush in which the president told him to do whatever was necessary to make the program legal. And in the end, the entire controversy was arguably unnecessary since the program was eventually approved by Congress and brought, at least partially, under the supervision of the FISA Court, as it could have been from the beginning. "I was sure the government was going to melt down," Goldsmith told me. "No one anticipated they were going to reverse themselves."

The heroes of Goldsmith's book — his historical models of presidential leadership in wartime — are Presidents Lincoln and Franklin D. Roosevelt. Both of them, as Arthur Schlesinger noted in his essay "War and the Constitution," "were lawyers who, while duly respecting their profession, regarded law as secondary to political leadership." In Goldsmith's view, an indifference to the political process has ultimately made Bush a less effective wartime leader than his greatest predecessors. Surprisingly, Bush, who is not a lawyer, allowed far more legalistic positions in the war on terror to be adopted in his name, without bothering to try to persuade Congress and the public that his positions were correct. "I don't know if President Bush understood how extreme some of the arguments were about executive power that some people in his administration were making," Goldsmith told me. "It's hard to know how he would know."

The Bush administration's legalistic "go-it-alone approach," Goldsmith suggests, is the antithesis of Lincoln and Roosevelt's willingness to collaborate with Congress. Bush, he argues, ignored the truism that presidential power is the power to persuade. "The Bush administration has operated on an entirely different concept of power that relies on minimal deliberation, unilateral action and legalistic defense," Goldsmith concludes in his book. "This approach largely eschews politics: the need to explain, to justify, to convince, to get people on board, to compromise."

Goldsmith says he remains convinced of the seriousness of the terrorist threat and the need to take aggressive action to combat it, but he believes, quoting his conservative Harvard Law colleague Charles Fried, that the Bush administration "badly overplayed a winning hand." In retrospect, Goldsmith told me, Bush "could have achieved all that he wanted to achieve, and put it on a firmer foundation, if he had been willing to reach out to other institutions of government." Instead, Goldsmith said, he weakened the presidency he was so determined to strengthen. "I don't think any president in the near future can have the same attitude toward executive power, because the other institutions of government won't allow it," he said softly. "The Bush administration has borrowed its power against future presidents."

Jeffrey Rosen, a law professor at George Washington University, is a frequent contributor to the magazine. He is the author most recently of ''The Supreme Court: The Personalities and Rivalries That Defined America.''

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Benczkowski, Brian A (OLA)

From:	Benczkowski, Brian A (OLA)
Sent:	Thursday, September 20, 2007 7:05 AM
To:	Bradbury, Steve
Subject:	Fw: your meeting with hill staff tomorrow!!!!

Just FYI- below emails reflect our communications with Mary DeRosa and Jack. (I assume Jack meant "without" executive branch permission....)

----- Original Message -----
From: Roland, Sarah E
To: Benczkowski, Brian A (OLA)
Sent: Wed Sep 19 20:56:01 2007
Subject: Fw: your meeting with hill staff tomorrow!!!!

Sarah Elizabeth Roland
U.S. Department of Justice
(202) 305-9134

----- Original Message -----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Roland, Sarah E
Sent: Wed Sep 19 20:51:44 2007
Subject: RE: your meeting with hill staff tomorrow!!!!

Sarah, I have no plans to discuss anything classified with anyone with Executive branch permission to do so. Thanks, Jack

---

From: Roland, Sarah E [mailto:Sarah.E.Roland@usdoj.gov]
Sent: Wed 9/19/2007 8:10 PM
To: Jack Goldsmith
Subject: Re: your meeting with hill staff tomorrow!!!!

Jack, please see my communication with Mary DeRosa below. Can I reach you on (b) (6) ?
I'm at (b) (6)

Thanks,
Sarah
Sarah Elizabeth Roland
Office of Legislative Affairs
United States Department of Justice
202-305-9134

From: Roland, Sarah E
Sent: Wednesday, September 19, 2007 8:07 PM
To: 'DeRosa, Mary (Judiciary-Dem)'
Cc: Rossi, Nick (Judiciary-Rep)
Subject: RE: Meeting with Jack Goldsmith

Mary,

It is our understanding that you have not been not been cleared to be briefed on the classified details of the President's prior program. If we are mistaken, please advise asap.

If our understanding is correct, then you are not authorized to discuss those details with Jack Goldsmith. Similarly, Jack Goldsmith is not authorized to disclose such details to you. It is our position that the substance of the legal issues raised by the Department of Justice in March, 2004 cannot be divorced from the operational details of intelligence activities that have not been publicly disclosed, that remain highly classified, and on which you have not been cleared to be briefed. Therefore, you should not discuss the nature and substance of the specific legal concerns raised in March, 2004 or other aspects of the still-classified NSA activities previously authorized by the President. Similarly, to the extent that you have been briefed on classified material that Mr. Goldsmith has not been briefed on, you are not authorized to disclose classified information to him. I would remind you that Mr. Goldsmith left the Department in 2004, and the recent briefing you had on the the FISC orders dates January 10, 2007 and forward.

If you, nonetheless, plan to go forward with this interview, we would request that Jody Hunt from the Civil Division attend on behalf of DOJ. Jody was DOJ's representative to all of the the Intelligence Committee interviews and hearings on this topic earlier this year.

Thanks much,
Sarah

From: DeRosa, Mary (Judiciary-Dem) [mailto:Mary_DeRosa@Judiciary-dem.senate.gov]
Sent: Monday, September 17, 2007 5:41 PM
To: Roland, Sarah E
Cc: Rossi, Nick (Judiciary-Rep)
Subject: Meeting with Jack Goldsmith

Sarah,

I just wanted to follow up my voicemail to you about Jack Goldsmith. He will be testifying before the Judiciary Committee on October 2 in open and closed sessions. This Thursday, September 20, Nick Rossi and I will be meeting with Goldsmith to discuss his testimony. We expect to discuss classified matters, including legal analysis and disputes related to the TSP. The meeting will be at 11:00 in the SSCI front conference room, SH-211. Please let me know if you or someone else will want to attend.

Thanks,

Mary

Bradbury, Steve

From: Bradbury, Steve
Sent: Thursday, September 20, 2007 9:32 AM
To: Hunt, Jody (CIV)
Subject: Re: your meeting with hill staff tomorrow!!!!

His book was reviewed and cleared for classification purposes. So it's fair of him to assume that whatever he said in his book is not classified. That said, his book didn't say anything much at all about the nonpublic aspects of the NSA activities or the substance of the legal dispute.

----- Original Message -----
From: Hunt, Jody (CIV)
To: Bradbury, Steve
Sent: Thu Sep 20 09:17:58 2007
Subject: Fw: your meeting with hill staff tomorrow!!!!

(b) (5)

----- Original Message -----
From: Hunt, Jody (CIV)
To: Roland, Sarah E
Sent: Thu Sep 20 09:00:42 2007
Subject: Re: your meeting with hill staff tomorrow!!!!

(b) (5)

----- Original Message -----
From: Roland, Sarah E
To: Hunt, Jody (CIV)
Sent: Thu Sep 20 08:47:55 2007
Subject: FW: your meeting with hill staff tomorrow!!!!

fyi

-----Original Message-----
From: Roland, Sarah E
Sent: Wednesday, September 19, 2007 9:11 PM
To: 'jgoldsmith@law.harvard.edu'
Subject: Re: your meeting with hill staff tomorrow!!!!

Thanks Jack.

Sarah Elizabeth Roland
U.S. Department of Justice
(202) 305-9134

----- Original Message -----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Roland, Sarah E
Sent: Wed Sep 19 21:05:23 2007
Subject: RE: your meeting with hill staff tomorrow!!!!

Yes -- I do not discuss classified information without Executive branch permission. Of course, I received pre-approval to talk about certain NSA matters in my book, but I will not go beyond that. Thanks, Jack

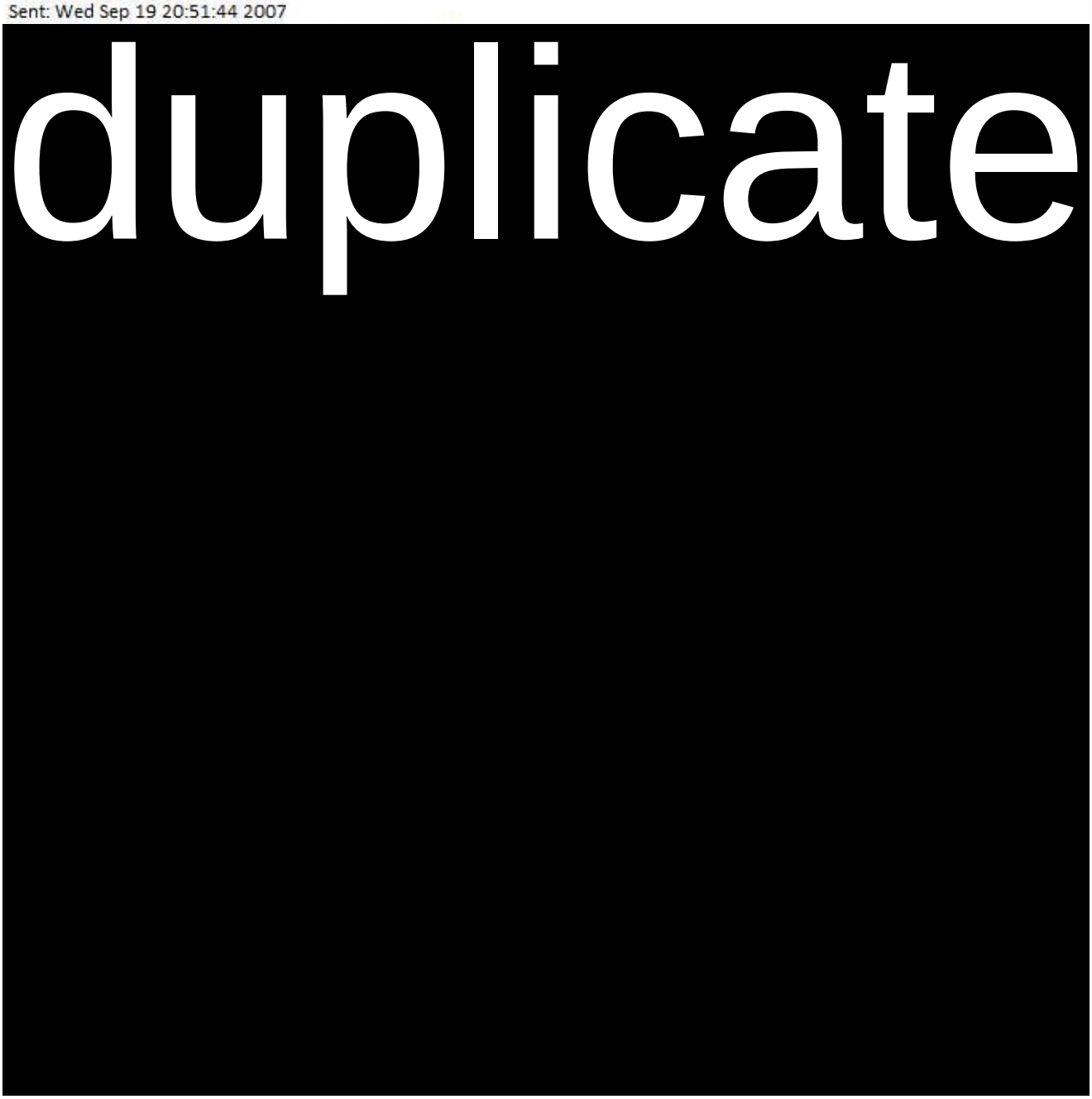
---

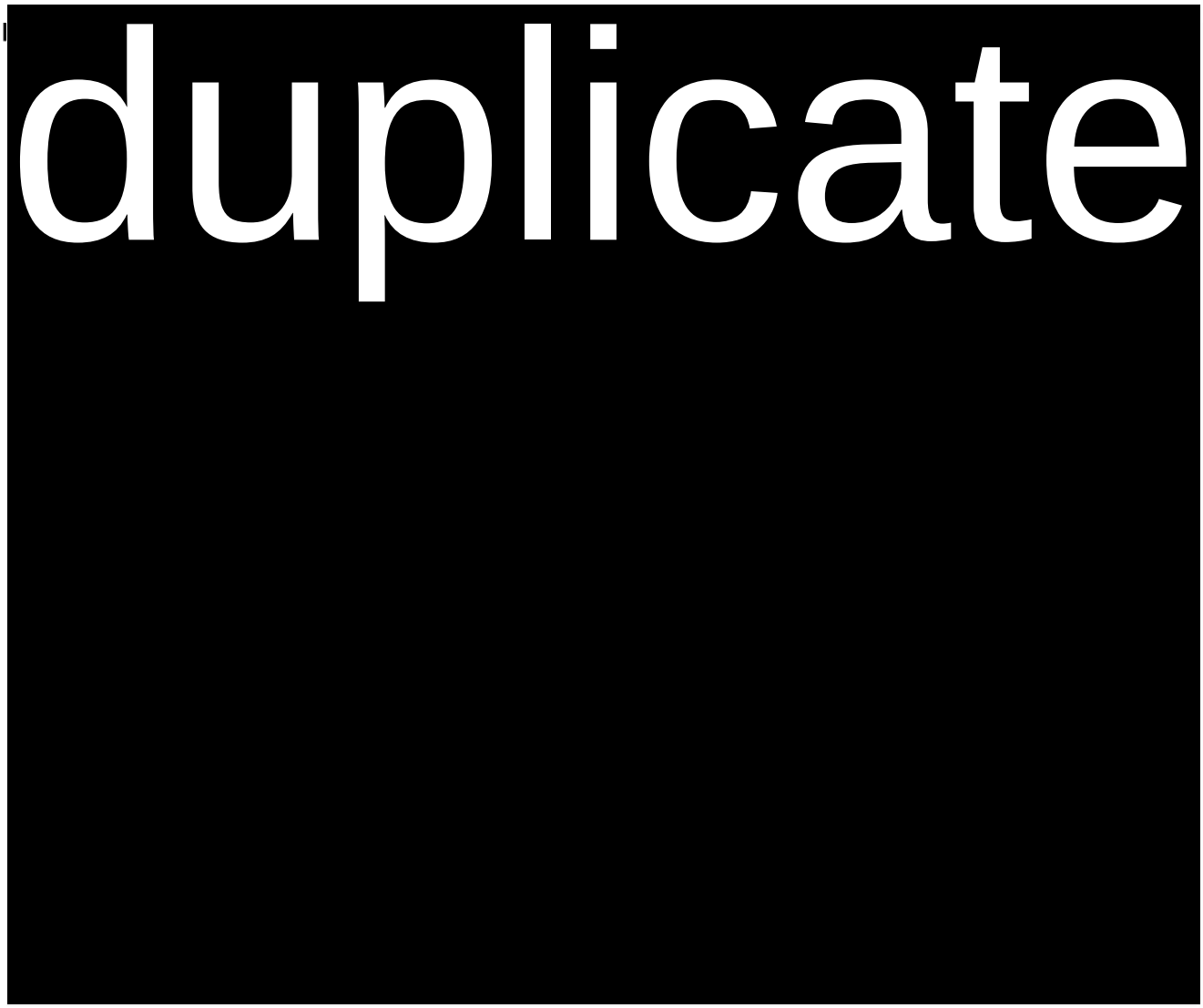
From: Roland, Sarah E [mailto:Sarah.E.Roland@usdoj.gov]
Sent: Wed 9/19/2007 9:03 PM
To: Jack Goldsmith
Subject: Re: your meeting with hill staff tomorrow!!!!

Did you mean "without" Exec branch permission?

Sarah Elizabeth Roland
U.S. Department of Justice
(202) 305-9134

----- Original Message -----
From: Jack Goldsmith <jgoldsmith@law.harvard.edu>
To: Roland, Sarah E
Sent: Wed Sep 19 20:51:44 2007




duplicate

Colborn, Paul P

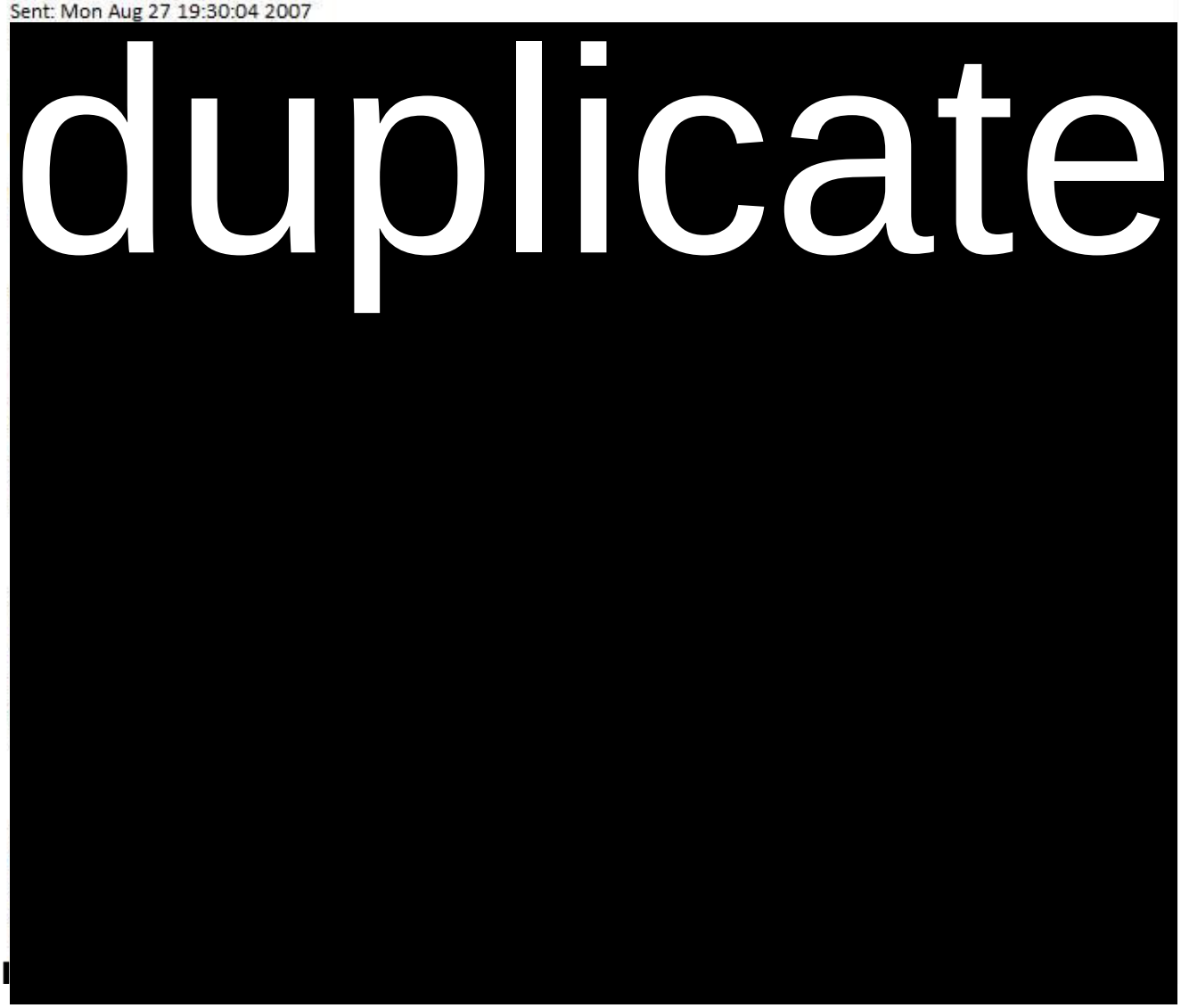
From: Colborn, Paul P
Sent: Thursday, September 27, 2007 2:22 PM
To: Forrester, Nate
Subject: FW: follow-up

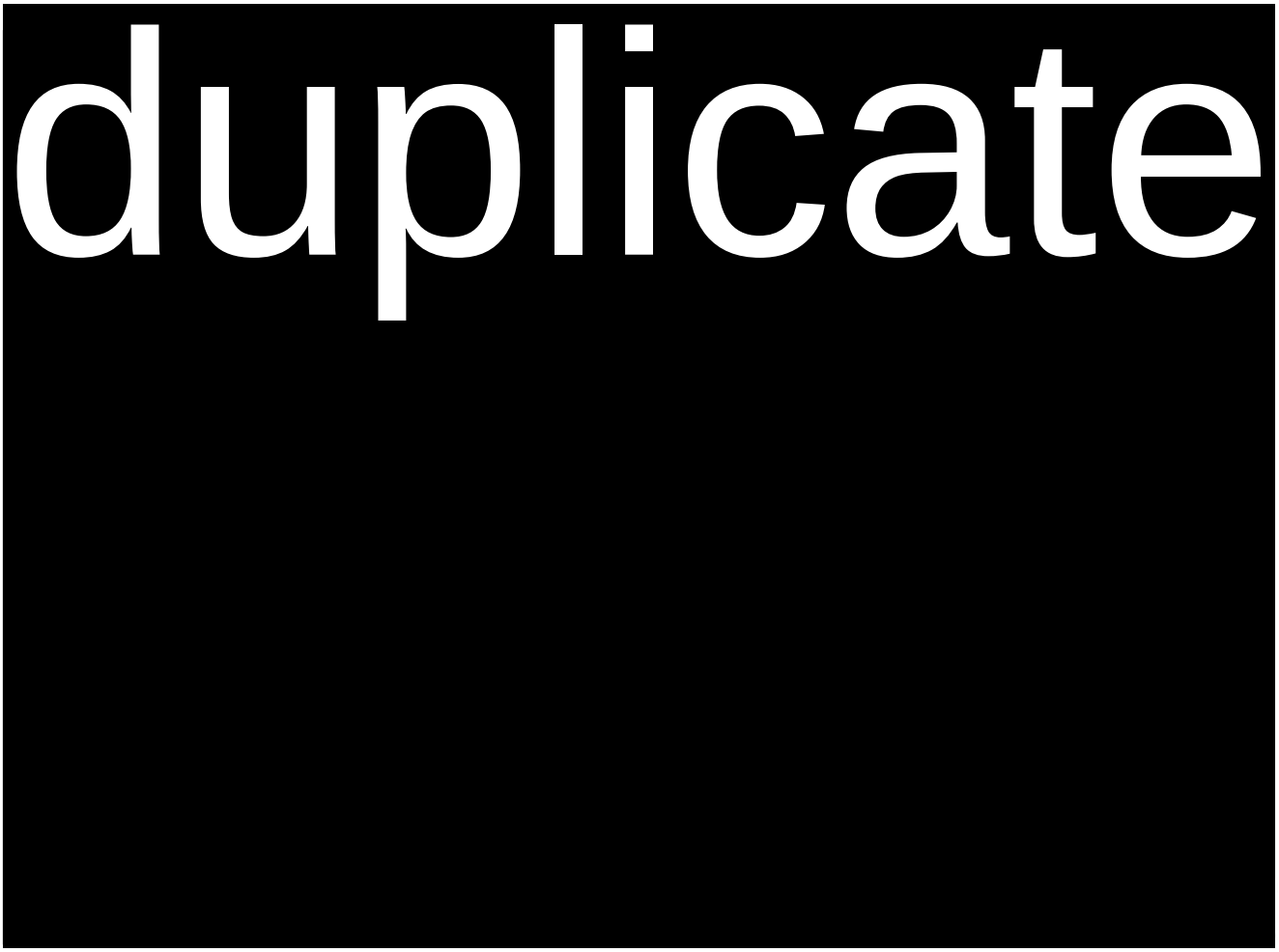
Here's Jack's explanation. Please keep this within OLC.

-----Original Message-----
From: Bradbury, Steve
Sent: Monday, August 27, 2007 7:41 PM
To: Colborn, Paul P; Eisenberg, John; Elwood, John
Subject: Fw: follow-up

FYI

----- Original Message -----
From: Jack Goldsmith <(b)(6) Jack Goldsmith (personal)
To: Bradbury, Steve
Sent: Mon Aug 27 19:30:04 2007





Colborn, Paul P

From: Colborn, Paul P
Sent: Friday, March 14, 2008 3:37 PM
To: (b) (6) - DOJ NSD; Lehotsky, Steve; Hart, Rosemary; Smith, Brad (OLC)
Subject: RE: Prepublication review questions

1. (b) (5) .

2. I'm just not deep enough into this yet to comment.

From: (b) (6) - DOJ NSD
Sent: Friday, March 14, 2008 2:52 PM
To: Colborn, Paul P; Lehotsky, Steve; Hart, Rosemary; Smith, Brad (OLC)
Subject: RE: Prepublication review questions

Thanks, Paul. I have been in touch with Vince Garvey at Fed Programs and will take you up on your suggestion to consult Stu Frisch as well.

On your specific points:

1. (b) (5)

2. (b) (5) . Does this sound right, or am I off base?

From: Colborn, Paul P
Sent: Friday, March 14, 2008 2:29 PM
To: Lehotsky, Steve (b) (6) - DOJ NSD; Hart, Rosemary; Smith, Brad (OLC)
Subject: RE: Prepublication review questions

(b) (6) - DOJ NSD, I haven't dug down much into the substance on this yet, but I have a couple of process suggestions. First, if you haven't already, I suggest you discuss this with Stu Frisch, JMD's GC. I think he has a lot of experience in this area. Also, I vaguely recall that Fed Programs (John Tyler, maybe?) has litigated some publication review cases. I suggest you consult with them too.

A couple quick points on the substance:

1. (b) (5)

[redacted] (b) (5) [redacted].

2. [redacted] (b) (5) [redacted].

From: Lehotsky, Steve
Sent: Friday, March 14, 2008 1:39 PM
To: [redacted] (b) (6) - DOJ NSD; Colborn, Paul P; Hart, Rosemary; Smith, Brad (OLC)
Subject: RE: Prepublication review questions

H [redacted] (b) (6) - DOJ NSD:

I don't know if others have thoughts on these issues; we probably would need to get a deputy involved to give you a firm answer on th [redacted] (b) (5) [redacted] question [redacted] (b) (5) [redacted]). For the moment, I have the following preliminary thoughts [redacted] (b) (5) [redacted]. Paul, Rosemary, Brad, please feel free to chime in if you disagree.

[redacted] (b) (5) [redacted]

(b) (5)

Steve

From: (b) (6) - DOJ NSD
Sent: Monday, March 10, 2008 5:58 PM
To: Colborn, Paul P; Hart, Rosemary; Lehotsky, Steve; Smith, Brad (OLC)
Subject: Prepublication review questions

All: I am in the process of drafting NSD's prepublication review policy and would love to pick your collective brain on a few fundamental questions. I spoke briefly with Steve, who suggested that I send an email to this group explaining the issues.

(b) (5)

[redacted] (b) (5)

[redacted]

Thanks in advance for any guidance you can provide. I hope to have a draft of the policy done by Friday, so it would be terrific even just to get your quick reaction to these issues whenever you have a chance. If it would be easier to get together to talk, that would be great too.

[redacted] (b) (6) - DOJ NSD

Koffsky, Daniel L (SMO)

From:	Koffsky, Daniel L (SMO)
Sent:	Friday, August 13, 2010 9:28 AM
To:	'Jack Goldsmith'
Cc:	Hinnen, Todd (NSD)
Subject:	RE: hi

Jack: I believe that the National Security Division handles pre-publication reviews. I'm therefore copying Todd Hinnen, a DAAG in NSD, in the hope that he can put you in touch with the right person in NSD or can redirect us if I'm on the wrong track.

--Dan

-----Original Message-----
From: Jack Goldsmith [mailto(b)(6) Jack Goldsmith (personal)
Sent: Friday, August 13, 2010 6:56 AM
To: Koffsky, Daniel L (SMO)
Subject: Fwd: hi

this got bounced - sending again

---------- Forwarded message ----------
From: Jack Goldsmith <(b)(6) Jack Goldsmith (personal) >
Date: 13 Aug 2010 06:06
Subject: hi
To: "Koffsky, Daniel L" <Daniel.L.Koffsky@usdoj.gov>

Hi Dan, I hope you are well, and that the Office is doing well. I write because I have written something and I am 99% sure it does not trigger any pre-clearance obligations, but I probably should look at the contract language. Is it possible to get copies of the contracts I signed (this paper touches on NSA stuff)? Please advise, or please point me to the person who might be able to do so. Thanks, Jack

Colborn, Paul P (SMO)

From:	Colborn, Paul P (SMO)
Sent:	Friday, September 3, 2010 5:18 PM
To:	Cedarbaum, Jonathan (SMO); Rhee, Jeannie (SMO)
Subject:	Conversation with Kate Shaw
Attachments:	CANONB04B65_SCANTODESKTOP_09032010-170152.PDF; CANONB04B65_SCANTODESKTOP_09032010-170325.PDF

FYI.

Earlier in the week Kate consulted me on the privilege review they are contemplated on former Secretary Rumsfeld's manuscript of his memoirs. My main comment/advice was to suggest that WHCO consult Bush reps Emmet Flood or Bill Burck on how they want to proceed.

The conversation sequed into a discussion of (b) (5) [redacted]. I said I would send her the DOJ policy.

From: Colborn, Paul P (SMO)
Sent: Friday, September 03, 2010 5:09 PM
To: 'Shaw, Katherine'
Subject: DOJ Policy on Removal of Records by Departing Officials

Kate, I think I promised to send you the DOJ policy documents on removal of records by departing officials. Attached is an order addressing that subject as well as a related regulation providing for access to documents after officials have departed. Let me know if you want to discuss this further.

Paul

<<CANONB04B65_SCANTODESKTOP_09032010-170152.PDF>> <<CANONB04B65_SCANTODESKTOP_09032010-170325.PDF>>

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 883

[Docket No. FR–4532–C–02]

RIN 2502–AH46

Increased Distributions to Owners of Certain HUD-Assisted Multifamily Rental Projects; Correction

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule; technical correction.

SUMMARY: This document makes a technical amendment to the final rule that was published October 13, 2000 (65 FR 61072), which adds an exception to current limits on distributions to owners for HUD-assisted multifamily rental projects.

EFFECTIVE DATE: November 13, 2000.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grants Administration, Department of Housing and Urban Development, 451 7th St. SW., Washington DC 20410, 202–708–2866. (This not a toll-free number.) For hearing- and speech-impaired persons, these numbers may be accessed via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On October 13, 2000 (65 FR 61072), HUD published a final rule adding an exception to current limits on distributions to owners for HUD-assisted multifamily rental projects. Two errors in part 883 of the final rule need correction.

Accordingly, FR Doc. 00–26247, Increased Distributions to Owners of Certain HUD-Assisted Multifamily Rental Projects, published in the **Federal Register** on October 13, 2000 (65 FR 61072), is corrected as follows:

1. On page 61075, first column, in instruction 11, correct part "881" to read "883".

2. On page 61075, first column, correct the heading for "§ 883.205" to read "§ 883.306."

Camille E. Acevedo,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 00–29098 Filed 11–14–00; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[A.G. Order No. 2333–2000]

RIN 1105–AA76

Access to Documents by Former Employees of the Department

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule establishes procedures under which former employees of the Department of Justice may request access to documents that they originated, reviewed, or signed while employees of the Department, for the purpose of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority. The rule designates component heads and the Assistant Attorney General for Administration as the deciding officials.

DATES: This rule is effective November 15, 2000.

FOR FURTHER INFORMATION CONTACT: Stuart Frisch, General Counsel, or Evelyn Tang, Attorney-Advisor, Office of the General Counsel, Justice Management Division, U.S. Department of Justice, 1331 Pennsylvania Avenue NW., Suite 520N, (202) 514–3452.

SUPPLEMENTARY INFORMATION:

A. Background

Whom Does This Rule Affect?

This rule applies to former employees of the Department who, after they leave the Department, have a need for access to Department documents that they originated, reviewed, or signed while employed by the Department, for the purpose of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority.

What Does This Rule Do?

A legitimate concern has been raised by current and former Department employees, that after they leave the Department, they may still be called upon to respond to official inquiries into their handling of matters at the Department. This is especially likely in the case of high-level employees. Without access to relevant documents to refresh their memories, it may be difficult to respond to such inquiries. To address this concern, this regulation establishes a procedure for former employees to request access to documents that they originated, reviewed, or signed while at the Department. As a general rule, former employees will be provided access to the documents if they are responding to an official inquiry by a federal, state, or local government entity or professional licensing authority—for example, responding to a Congressional committee request, an investigation by an Inspector General, an investigation by a state or local law enforcement agency, or a disciplinary action by a bar association. The Department may deny or limit access where providing the requested access would be unduly burdensome. This rule does not create a right enforceable at law by a party against the United States.

What Type of Documents Does the Rule Cover?

The rule covers only documents that a former employee originated, reviewed, or signed while employed by the Department. Documents include memoranda, drafts, reports, notes, written communications, and documents stored electronically that are in the possession of the Department.

B. Administrative Procedure Act

This rule is a rule of agency organization, procedure, and practice; it is therefore exempt from the notice requirement of 5 U.S.C. 553(b) and is made effective upon issuance.

C. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. This rule merely establishes procedures under which former employees of the Department of Justice may, for the purpose of responding to an official inquiry, request access to documents they originated, reviewed, or signed while employed by the Department.

D. Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866. The Department has determined that this rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and accordingly this rule has not been reviewed by the Office of Management and Budget.

E. Unfunded Mandates Reform Act of 1995

This rule will not, in the aggregate, result in this expenditure by state, local, and tribal governments, or by the private sector, of $100,000,000 or more

in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

F. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this action pertains to agency management and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804). Therefore, the reports to Congress and the General Accounting Office specified by the SBREFA are not required.

List of Subjects in 28 CFR Part 16

Administrative practice and procedure, Courts, Freedom of Information, Privacy, Sunshine Act.

For the reasons stated in the preamble, Title 28 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

2. Add Subpart G to Part 16 to read as follows:

Subpart G—Access to Documents by Former Employees of the Department

Sec. 16.300 Access to documents for the purpose of responding to an official inquiry.

16.301 Limitations.

Subpart G—Access to Documents by Former Employees of the Department

§ 16.300 Access to documents for the purpose of responding to an official inquiry.

(a) To the extent permitted by law, former employees of the Department shall be given access to documents that they originated, reviewed, or signed while employees of the Department, for the purpose of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority. Documents include memoranda, drafts, reports, notes, written communications, and documents stored electronically that are in the possession of the Department. Access ordinarily will be provided on government premises.

(b) Requests for access to documents under this section must be submitted in writing to the head of the component where the employee worked when originating, reviewing, or signing the documents. If the employee requesting access was the Attorney General, Deputy Attorney General, or Associate Attorney General, the request may be granted by the Assistant Attorney General for Administration. This authority may not be delegated below the level of principal deputy component head.

(c) The written request should describe with specificity the documents to which access is sought (including time periods wherever possible), the reason for which access is sought (including the timing of the official inquiry involved), and any intended disclosure of any of the information contained in the documents.

(d) The requester must agree in writing to safeguard the information from unauthorized disclosure and not to further disclose the information, by any means of communication, or to make copies, without the permission of the Department. Determinations regarding any further disclosure of information or removal of copies shall be made in accordance with applicable standards and procedures.

§ 16.301 Limitations.

(a) The Department may deny or limit access under this subpart where providing the requested access would be unduly burdensome.

(b) Access under this subpart to classified information is governed by Executive Order 12958 and 28 CFR 17.46. Requests for access to classified information must be submitted to (or will be referred to) the Department Security Officer and may be granted by the Department Security Officer in consultation with the appropriate component head.

(c) Nothing in this subpart shall be construed to supplant the operation of other applicable prohibitions against disclosure.

(d) This subpart is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

Dated: November 7, 2000.

Janet Reno,

Attorney General.

[FR Doc. 00–29208 Filed 11–14–00; 8:45 am]

BILLING CODE 4410–C5–M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022 and 4044

Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in December 2000. Interest assumptions are also published on the PBGC's web site (www.pbgc.gov).

EFFECTIVE DATE: December 1, 2000.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: The PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

Three sets of interest assumptions are prescribed: (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in Appendix B to Part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in Appendix B to Part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in Appendix C to Part 4022). (See the PBGC's two final rules published March 17, 2000, in the **Federal Register** (at 65 FR 14752 and 14753). Effective May 1, 2000, these rules changed how the interest

U.S. DEPARTMENT OF JUSTICE

Order

Subject: REMOVAL AND MAINTENANCE OF, AND ACCESS TO, DOCUMENTS

1. PURPOSE. This order establishes policy and procedures on removal from Department of Justice custody, and requests for maintenance of or access to documentary materials, by current, departing, and former employees. It establishes the responsibilities of component heads with regard to such materials, and establishes a Department Document Committee to provide recommendations regarding requests for removal of or access to nonpublic documents.

2. SCOPE. This order applies to all employees (see paragraph 5h of this order) in all bureaus, offices, boards, and divisions (hereinafter components) in the Department of Justice regardless of the type or duration of their appointment.

3. CANCELLATION. Order DOJ 2710.8B is canceled.

4. REFERENCE. This order is issued under authority provided in 5 U.S.C. § 301, 28 U.S.C. § 507, 28 C.F.R. § 0.75(j), and 36 C.F.R., Chapter XII, § 1222.40.

5. DEFINITIONS.

   a. Removal. Permanent removal from the custody of the Department of Justice. This does not include the withdrawal of materials for official business by authorized employees.

   b. Access. Opportunity to review documents on government premises or at another agreed-upon location.

   c. Departing Employee. One who leaves the Department's employment. This does not include one changing jobs within the Department. The prohibitions regarding removal apply to current as well as departing employees.

Distribution: BUR/H-1
OBD/H-1
SPL-23

Initiated By: Justice Management Division
Office of General Counsel

d. Documentary Materials. All Federal records, nonrecord materials, and personal papers, regardless of the nature of the medium or the method or circumstances of recording.

e. Federal Records or Records. All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, that are made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business, and that are preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them. (44 U.S.C. § 3301.) Electronic communications such as electronic mail messages may meet this definition.

f. Nonrecord Materials. Nonrecord materials include:

(1) Those Federally-owned documentary materials that do not meet the statutory definition of records (44 U.S.C. § 3301) (see paragraph 5e) or that have been specifically excluded from coverage. Materials excluded from the definition of records include extra copies of documents (but only if the sole reason such copies are preserved is for convenience of reference); library and museum materials (but only if such materials are made or acquired and preserved solely for reference or exhibition purposes); and stocks of publications and of processed documents. (These are defined as "nonrecord materials" by regulations of the National Archives and Records Administration (NARA) (36 C.F.R. § 1222.34).)

(2) Documentary materials not owned by the Federal government, including documentary materials (or any reasonably segregable portion thereof) of a private or nonpublic character that do not relate to, or have an effect upon, the conduct of agency business. (These are defined as "personal papers" by NARA regulations (36 C.F.R. § 1222.36).)

g. Classified Information. Information that requires protection against unauthorized disclosure in the interest of national security and that is within the scope of 28 C.F.R. Part 17.

h. Officer or Employee. An "officer" as defined by 5 U.S.C. § 2104 and an "employee" as defined by 5 U.S.C. § 2105. The term "employee" will be used to designate both officers and employees, and refers to all personnel employed by the Department of Justice.

6. POLICY ON SEGREGATION OF DOCUMENTARY MATERIALS. The following procedures will assist in making subsequent determinations regarding the removal of documentary materials.

a. Separation of Personal Papers. Personal papers (not relating to agency business) shall be clearly designated as such and shall at all times be maintained separately from office files. (See paragraph 5f(2).)

b. Partial Federal/Personal Record. If information about personal matters and Department of Justice business appears in the same document, the document shall be copied with the personal information deleted, and the remaining record treated as a Federal record. (See paragraph 5e.)

c. Use of Labeling. Documentary materials labeled "personal," "confidential," or "private," or similarly designated, used in the transaction of public business and which meet the definition of a record, are Federal records subject to the provisions of pertinent laws and regulations. The use of a label such as "personal" is not sufficient to determine the record status of documentary materials.

7. POLICY ON REMOVAL OF DOCUMENTARY MATERIALS.

a. The following types of documentary materials may NEVER be removed:

(1) Any federal record;

(2) The only copy of any documentary materials involved in the conduct of the affairs of the Department or any other components of the Federal Government, whether or not judged to be records (including any copy that is unique, for example because it contains the signature or initials of the writer, reviewers, and/or concurring parties);

(3) Any documentary materials (whether or not judged to be records) the removal of which will create such a gap in the files as to impair the completeness of essential documentation;

(4) The only copy of indices or other finding aids (whether or not judged to be records) that are necessary to the use of office files;

(5) Portions of documentary materials (whether or not judged to be records) that constitute classified information;

(6) Portions of documentary materials (whether or not judged to be records) that constitute information subject to the Privacy Act of 1974, 5 U.S.C. § 552a; and

(7) Portions of any other documentary materials (whether or not judged to be records) that constitute information the disclosure of which is prohibited by law, such as grand jury, tax, and trade secret information.

b. All other types of nonpublic Federally-owned documentary materials, including privileged materials, may be removed only with specific approval, as described in paragraph 8. (A publicly available document such as a brief filed in court or a newspaper article may be removed without approval.)

8. DOCUMENT REQUESTS BY DEPARTING OR FORMER EMPLOYEES.

a. Prior to departure, employees may assemble copies of documents that they originated, reviewed, or signed while employees of the Department, for the purpose of making a request pursuant to paragraph 8b. Except for requests made for purposes of responding to an official inquiry, as referenced in paragraph 8g, documents must be assembled prior to making a request pursuant to paragraph 8b.

b. Departing or former employees may request the following:

(1) Removal or access subject to a nondisclosure agreement. The requester must agree in writing to safeguard the information from unauthorized disclosure and not to further disclose the information by any means of communication. Determinations regarding such removal or access shall be made in accordance with the standards set forth in, or established pursuant to, this order, including paragraphs 8d and paragraph 9; and/or,

(2) Removal or access not subject to a nondisclosure agreement. Determinations regarding such removal or access shall be made in accordance with applicable standards for public disclosure, subject to the provisions of paragraph 8d; or,

(3) Maintenance by the Department for a limited period of time. A departing or former employee may request maintenance of assembled documents for a specific period of time during which he or she may request removal or access pursuant to paragraphs 8b(1) and/or (2).

c. A request must be submitted in writing to the head of the component in which the requester is or was employed. In the case of component heads, the request must be submitted to the Assistant Attorney General for Administration (AAG/A). In the case of the AAG/A, the request must be submitted to the Deputy Attorney General.

d. The deciding official may, at his or her discretion, deny the request in whole or in part on any reasonable basis, such as to protect privacy interests, governmental privilege, law enforcement interests, or commercial interests, or because of the administrative burden of reviewing the documents requested.

e. In cases where the AAG/A is the deciding official and the Department Document Committee (as established in paragraph 9) intends to recommend denial of the request on the basis of administrative burden, it shall notify the requester of its proposed recommendation and give the requester an opportunity to negotiate an accommodation. If no agreement

can be reached, the requester shall be given an opportunity to present his or her position to the AAG/A prior to the AAG/A's decision. If the AAG/A denies a request on the basis of administrative burden, upon request, the AAG/A shall provide the requester with a written explanation of the reason for the denial, including a description of the administrative burden that processing the request would entail.

f. If a request under paragraphs 8b(1) or (2) is denied based in whole or in part on administrative burden, the deciding official may agree to maintain those documents for a limited period of time after the denial, during which time a requester may submit a more narrow request for consideration.

g. At any time, regardless of prior assembly of documents, former employees of the Department may be granted access to documents that they originated, reviewed, or signed while employees of the Department, for the purpose of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, pursuant to 28 C.F.R § 16.300. In addition to obtaining access pursuant to 28 C.F.R § 16.300, former employees may at the same time also request approval to remove any of these documents pursuant to the procedures and standards set forth in paragraph 8.

9. DEPARTMENT DOCUMENT COMMITTEE. There is established a Department Document Committee (DDC) to make recommendations to the AAG/A regarding requests from all departing or former employees who seek the AAG/A's approval to remove nonpublic documents and to provide such other advice as the AAG/A may request. The DDC will consist of five members, including one representative of each of the following components: the Office of Legal Counsel, the Office of Legislative Affairs, the Justice Management Division, the Office of Information and Privacy, and one of the leadership offices. The head of each component represented on the DDC will designate an employee within his or her component to serve on the DDC, and the Deputy Attorney General will designate a representative for the leadership offices. If the AAG/A deviates from a recommendation of the DDC, the AAG/A shall note the final decision in writing.

10. DELEGATION.

a. The head of each component is responsible for:

(1) Deciding upon requests made pursuant to paragraph 8; and

(2) Ensuring that:

(a) Each employee is apprised of the contents of this order.

(b) Each departing employee is provided the guidance shown at Appendix 2.

(c) Each departing employee who is removing or accessing documents subject to a nondisclosure agreement executes such agreement before removing documents or obtaining access. The nondisclosure agreement shown at Appendix 1 shall be used.

(d) There is established a centralized office file of executed nondisclosure agreements within the component, with such executed agreements to be retained for ten (10) years.

b. The component head may delegate this authority.

11. STATUTORY PENALTIES AND REQUIREMENTS.

a. The disposal of Federal records in agency custody is governed by specific provisions of chapter 33 of title 44, United States Code.

b. Criminal penalties are provided in 18 U.S.C. § 2071 for the unlawful removal or destruction of Federal records.

c. Criminal penalties are provided in 18 U.S.C. §§ 793, 794, and 798 for the unlawful disclosure, loss, or destruction of certain information pertaining to national defense or national security.

d. Other criminal and civil penalties may apply for unlawful disclosure of statutorily confidential information.

e. The Attorney General is required by 44 U.S.C. § 3106 to notify the Archivist of the United States of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of Federal records in the custody of the Department.

12. NO RIGHT OF ACTION. This order does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

JANET RENO
Attorney General

APPENDIX 1. REQUEST AND NONDISCLOSURE AGREEMENT.

I request permission under Order DOJ 2710.8C to remove copies of the following types of materials that I have worked on during my tenure at the Department [briefly describe materials]:

_____

_____

_____

These materials do not include any classified information, information that is protected by the Privacy Act, or any other materials the removal of which is prohibited by Order DOJ 2710.8C.

I agree to keep all nonpublic materials absolutely confidential and will not disclose their contents or existence without prior permission of the Department.

_____
Employee's Signature

_____
Date

Permission is:

____ Granted

____ Denied

_____ _____

Name of Approving Official Title

_____ _____

Signature Date

APPENDIX 2. PRIVACY ACT GUIDANCE FOR DEPARTING EMPLOYEES.

The Privacy Act, 5 U.S.C. § 552a, prohibits the disclosure of certain records about an individual except under certain specified circumstances. This document provides a practical guide for those employees who are unfamiliar with the specific requirements of the Privacy Act. We note that this guide probably prohibits the removal of a broader range of materials than would be prohibited by the statute. Therefore, if you follow the guidance, you will not violate the Privacy Act. You are free, however, to consult the statute itself to determine how to comply with the Privacy Act.

As an employee of the Department of Justice, you were entitled to have access to and/or copies of records about an individual when such access was necessary for you to perform your official duties. However, once you cease to be an employee of the Department, you are no longer entitled to the special access that you previously had by virtue of that position. This is true even if you authored or had a role in the preparation of particular records.

Consequently, upon your departure, you should not remove any records or copies from the Department that are about an individual. Generally, a record is about an individual if it contains some substantive information about the individual (e.g., employment records, medical records, home address). A record is not about an individual if it is about a person or entity that is not afforded Privacy Act protection (e.g., a corporation or organization, a person who is neither a U.S. citizen nor a permanent resident, a deceased person), or if it does not identify the individual who is the subject of the record by name or other identifier and provide information about that individual (e.g., an agency memorandum that contains the name of the author of the memorandum, the name of the recipient, and perhaps even other employee names on a distribution list but that does not contain any information about those or any other individuals mentioned in the record). The Department may permit you to take materials about an individual if they officially have been placed in the public domain.

Colborn, Paul P (SMO)

From:	Colborn, Paul P (SMO)
Sent:	Friday, September 3, 2010 6:19 PM
To:	Cedarbaum, Jonathan (SMO)
Cc:	Rhee, Jeannie (SMO)
Subject:	Re: Conversation with Kate Shaw

DoD has regs but they address taking docs (they are quite permissive). They don't apply to the situation of departed official writing book containing privileged info.

From: Cedarbaum, Jonathan (SMO)
To: Colborn, Paul P (SMO); Rhee, Jeannie (SMO)
Sent: Fri Sep 03 17:51:14 2010
Subject: RE: Conversation with Kate Shaw

Thanks. Does DOD not have its own regs re document retention by former officials?

From: Colborn, Paul P (SMO)
Sent: Friday, September 03, 2010 5:18 PM
To: Cedarbaum, Jonathan (SMO); Rhee, Jeannie (SMO)

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Friday, August 9, 2013 2:12 PM
To: Seitz, Virginia A (OLC); Krass, Caroline D. (OLC); Bies, John (OLC)
Subject: OLC/WH Communications
Attachments: goldsmithmanuscript.pdf

FYI: I think I've probably told one or more of you about how Steve Bradbury and I unsuccessfully attempted to persuade Jack Goldsmith to remove OLC/WH communications from the manuscript of *The Terror Presidency.* In looking through an attorney-client privilege file, I just came upon the note Steve Bradbury sent Jack expressing our concern that the disclosures "have the real potential to undermine our ability to function most effectively as the principal legal adviser to the Executive Branch." I thought you might be interested and have therefore attached the note.

Colborn, Paul P (OLC)

From:	Colborn, Paul P (OLC)
Sent:	Monday, March 14, 2016 12:32 PM
To:	Bies, John (OLC); Koffsky, Daniel L (OLC)
Cc:	El-Khouri, Adele (OLC)
Subject:	FW: Barron manuscript

Thanks much, Adele.

John & Dan, based on this, I think we should raise this issue directly with David – perhaps calling him and saying something like "(b) (5) [redacted]"

I'd be happy to make the call, or should a larger group undertake the call?

From: El-Khouri, Adele (OLC)
Sent: Monday, March 14, 2016 12:14 PM
To: Colborn, Paul P (OLC)
Subject: RE: Barron manuscript

Paul,

After doing some research, (b) (5) [redacted]

From: Colborn, Paul P (OLC)
Sent: Friday, March 11, 2016 5:45 PM
To: El-Khouri, Adele (OLC)

Subject: Barron manuscript

Adele, David Barron pinged NSD today. Do you think you'll be able to track down that one point by Monday afternoon?

From: Colborn, Paul P (OLC)
Sent: Friday, March 11, 2016 5:42 PM
To: Tiernan, Kevin (NSD)
Cc: Bradley, Mark A (NSD)
Subject: RE: chapter

Kevin, I received your voice mail. We are almost done with our review here. There's just one more thing we need to check. I think we'll be done on Monday.

From: Tiernan, Kevin (NSD)
Sent: Monday, March 07, 2016 10:51 AM
To: Colborn, Paul P (OLC)
Cc: Bradley, Mark A (NSD)
Subject: RE: chapter

No. He just reached out to Mark to submit this one chapter.

We generally leave it to authors to determine the extent of their obligation and do not probe beyond what they submit.

From: Colborn, Paul P (OLC)
Sent: Monday, March 07, 2016 10:49 AM
To: Tiernan, Kevin (NSD)
Cc: Bradley, Mark A (NSD)
Subject: RE: chapter

OK. Do you know what the basic subject matter of the book is?

From: Tiernan, Kevin (NSD)
Sent: Monday, March 07, 2016 10:47 AM
To: Colborn, Paul P (OLC)
Cc: Bradley, Mark A (NSD)
Subject: RE: chapter

There has not been any review of the other chapters because he determined that this is the chapter that touches on his work for the Department. He expressed as much to Mark.

We can ask for the other chapters if you think that is necessary.

From: Colborn, Paul P (OLC)
Sent: Monday, March 07, 2016 10:43 AM
To: Tiernan, Kevin (NSD)
Cc: Bradley, Mark A (NSD)
Subject: RE: chapter

Kevin, is this a chapter in a book that David is trying to publish? If so, what is the status of the review of other chapters?

From: Tiernan, Kevin (NSD)

Sent: Monday, March 07, 2016 9:59 AM
To: Colborn, Paul P (OLC)
Cc: Bradley, Mark A (NSD)
Subject: FW: chapter

Paul:

We received the attached chapter from former Acting AAG for OLC David Barron for review under 28 CFR 17.18 (also attached). Given his former position, and the topics the chapter addresses, we thought it would be prudent to share the chapter with you for your review and clearance.

Many thanks,
Kevin

Kevin G. Tiernan
USDOJ/NSD/Office of Law and Policy
Records and FOIA
600 E Street NW, Room 10702
Washington, DC 20005

202/233-0755

From: David Barron [mailto:(b)(6) David Barron (personal)]
Sent: Friday, March 04, 2016 2:03 PM
To: Bradley, Mark A (NSD)
Cc: Tiernan, Kevin (NSD)
Subject: Re: chapter

how about now?

On Fri, Mar 4, 2016 at 1:50 PM, Bradley, Mark A (NSD) <Mark.A.Bradley@usdoj.gov> wrote:
No, David. We have received nothing so far.--Mark

-----Original Message-----
From: (b)(6) David Barron (personal) [mailto(b)(6) David Barron (personal)]
Sent: Friday, March 04, 2016 1:49 PM
To: Bradley, Mark A (NSD)
Subject: Re: chapter

Mark. Just wants to confirm that you got this. Thanks

> On Mar 4, 2016, at 10:36 AM, David Barron <(b)(6) David Barron (personal)> wrote:
>
> Thanks so much Mark for taking a look at this. It is attached.
> <Epilogue.bradley.docx>